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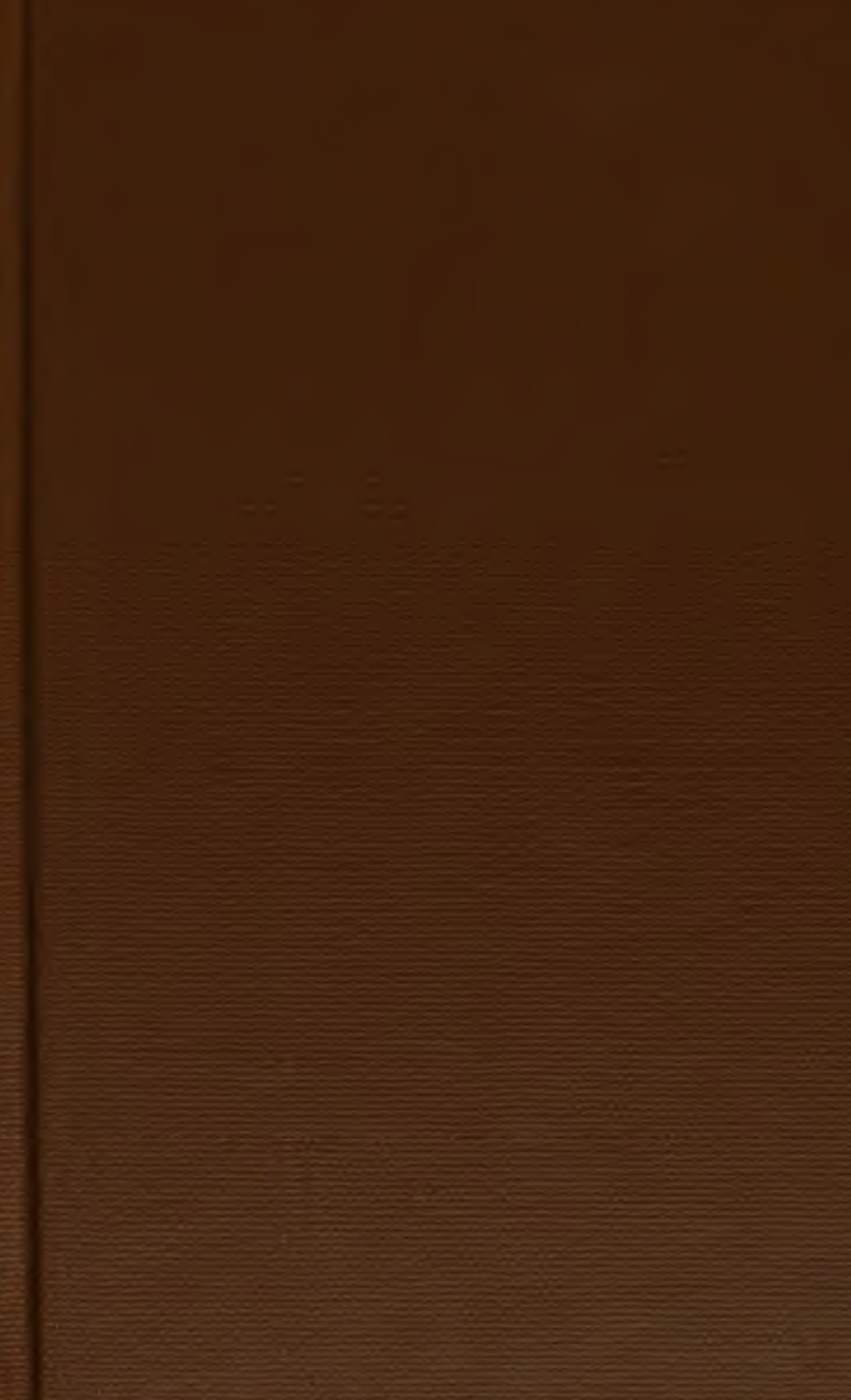
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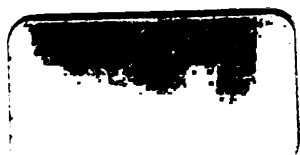
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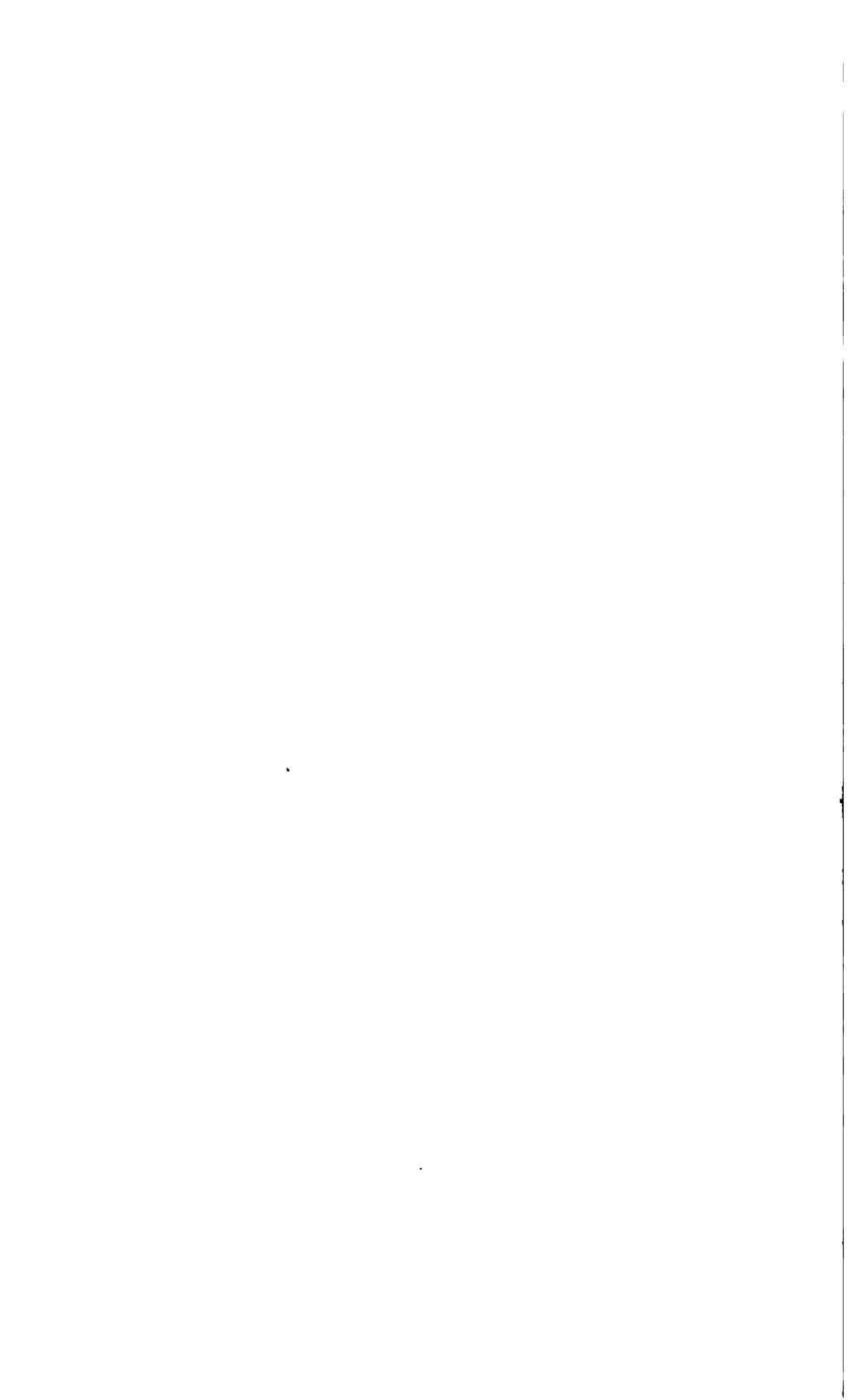
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AN EXACT
ABRIDGMENT,
IN ENGLISH,
OF THE
ELEVEN BOOKS OF REPORTS
OF THE LEARNED
SIR EDWARD COKE, KNT.

Late Lord Chief Justice of England, and of the Councell of Estate to His
Majesty King James.

COMPOSED BY THE JUDICIOUS

SIR THOMAS IRELAND, KNT.

Late of Grayes Inne, and an Antient Reader of that Honorable
Societie.

Wherein is briefly contained the very substance and marrow of all those
Reports, together with the Resolutions on every Case.

Also a perfect Table for the finding of the Names of all those Cases, and the
Principal Matters therein contained; very usefull for all men, espe-
cially the Students and Practisers of that Honorable Profession.

Brevitas Memoria Amica.

FIRST AMERICAN FROM THE THIRD LONDON EDITION.

TO WHICH IS NOW ADDED,
AN ABRIDGMENT
OF THE
TWELFTH AND THIRTEENTH BOOKS.
BY JOHN A. DUNLAP.

LONDON, PRINTED: 1657.

NEW-YORK:

PUBLISHED BY I. RILEY, No. 4, CITY-HOTEL.

.....

September, 1813.

13

DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, That on the twenty-first day of August, in the thirty-eighth year of the Independence of the United States of America, ISAAC HILEY, of the said district, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words following, to wit:

"An exact Abridgment, in English, of the Eleven Books of Reports of the learned Sir Edward Coke, Knt. late Lord Chief Justice of England, and of the Councell of Estate to his majesty King James. Composed by the judicious Sir Thomas Ireland, Knt. late of Grayes Inne, and an antient reader of that honorable societie. Wherein is briefly contained the very substance and marrow of all those reports, together with the resolutions on every case. Also a perfect table for the finding of the names of all those cases, and the principal matters therein contained; very usefull for all men, especially the students and practitioners of that honorable profession. *Brevitas Memoriae Amica*. First American from the third London edition. To which is now added an Abridgment of the Twelfth and Thirteenth Books. By John A. Dunlap."

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THERON RUDD,
Clerk of the District of New-York.

TO THE READER.

GENTLE READER,

THE abridger of these reports was not only a learned lawyer, but also was very conversant with the author of them : for my part, I was only entreated by many friends to view and correct the copy from the presse : if any faults be, you may blame the printer. If I *should* commend the originall work, I should disparage the author, who all learned lawyers know, that never any man wrote like him : and for the excellency of this abridgement, it hath in it the very pith and substance of the reports at large, and so I rest.

It is an abuse, that the lawes and usages of the realme, with their causes, are not written, whereby they may be known, so that they may be understood of all. *Mirroure Justice*, fol. 225.

PREFACE TO THE FIFTH EDITION.

OF Sir Thomas Ireland, by whom the first eleven books of Coke's Reports were abridged, I have been unable to find any further particulars than those stated in the title page and preface to the third edition of his abridgment, excepting that he also abridged the reports of Sir James Dyer, printed in 1651. The third edition of the abridgment of Coke, from which the present is taken, was printed in 1657. There had been a previous edition, whether the first or second, I cannot discover, in 1650, and a later one in 1666; so that this work had gone through no less than four impressions within no very long period after the original reports of Sir Edward Coke first appeared; an unequivocal sign of the estimation in which it was held.

To the American edition, is added an abridgment of the twelfth and thirteenth books of the reports. These were not published until after the death of the author, and although containing some important decisions, are not, in general, of as much utility to the practitioner as the former books. Many of the cases, although of importance when decided, have now become useless to the merely practical lawyer, as well in England as in this country: the abolition of the feudal tenures and of the courts of star-chamber and high commissions have rendered many of the decisions obsolete in that country; and in this, our never having adopted the ecclesiastical jurisdictions, and our different judicial polity, render many more inapplicable. In forming the abridgment of these two parts, reference has always been had to the importance of the decision. In the description of cases just referred to, the utmost brevity

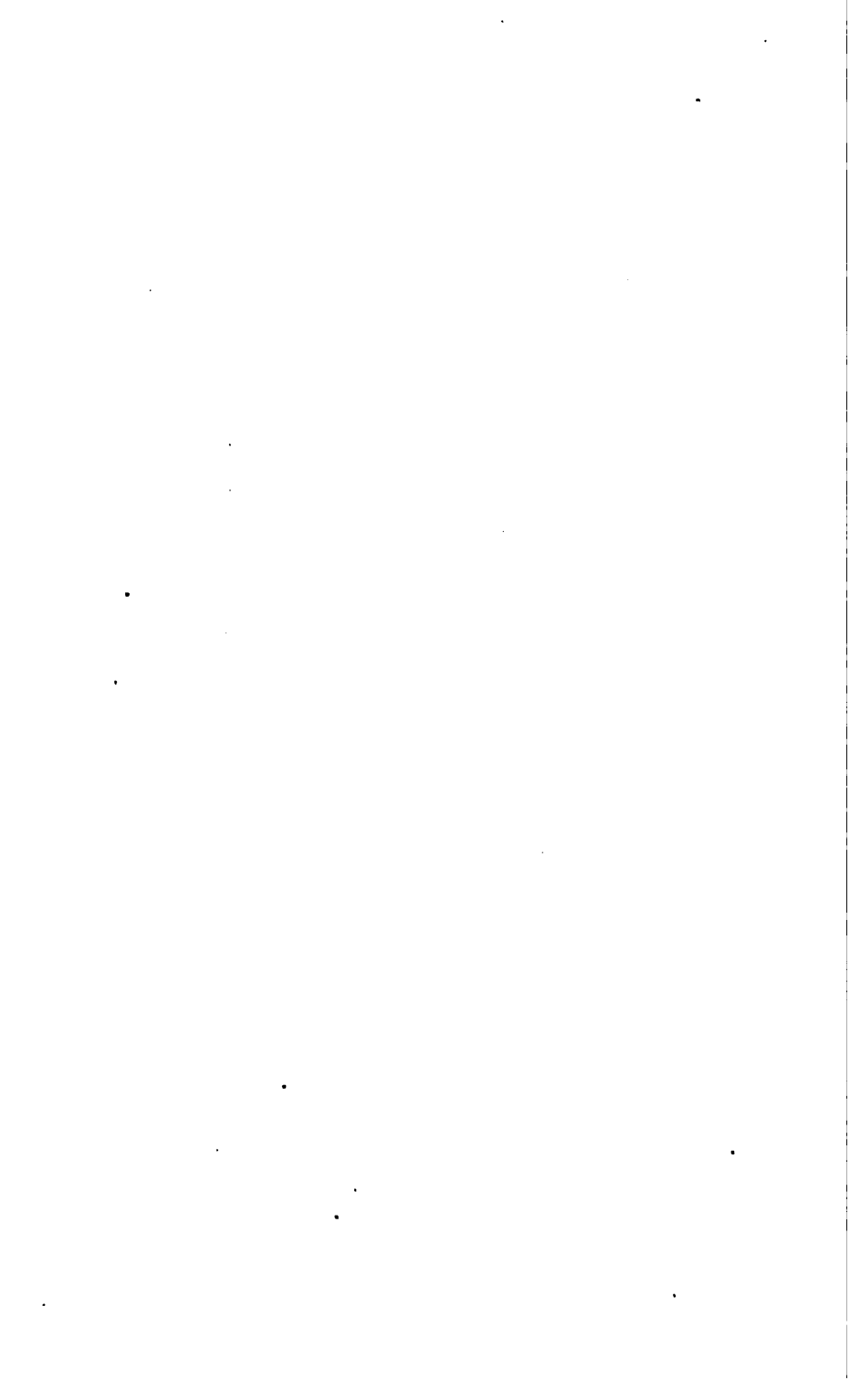
PREFACE.

has been studied, and merely the statement of the case, and the points which were adjudicated, are given ; in other instances they have been extended to a greater length.

The phraseology of the original reports has been preserved as far as was consistent with the nature of the work.

As the eleven books, abridged by Sir Thomas Ireland, were not submitted to the revisal of the person who abridged the two last, he does not consider himself accountable for any inaccuracies which may be discovered in them.

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AN
ABRIDGMENT
OF
COKE'S REPORTS.

THE FIRST BOOK.

The Lord Buckhursts Case, 40 Eliz. fo. 1.

IF a man for him and his heirs, do warrant land to one and his heirs ; this is a general warranty, because there is not a restraint against any particular person in certain.

Upon a feoffment without warranty, the feoffee shall have all the charters, which comprize warranty, and others, though they be not given to him, because he is to defend the title at his peril. Upon a feoffment with warranty, without expresse grant, the feoffee shall not have any charters which serve for to derain the warranty paramount. Also the feoffor shall have all charters, which serve for maintenance of the title ; the feoffee shall have all which maintain the possession ; as court rolls, and which are concomitant and incident to the possession.

If A. be seized of a seigniorie, rent, advowson, or other thing that lyeth in grant, and grant the same over unto B. with warranty, and B. grant that to C. with warranty. In this case C. shall have the first deed, although B. be bound to warranty, for without that he cannot make any defence against A. or any claiming by him.

Pelham's Case, 32 Eliz. fo. 14.

A. tenant for life, the remainder in tail, the remainder in fee, bargains and sells the land to one, who before the sta-

tute of 14 *El. ca. 8.* suffers a recovery, in which A. is vouched, and voucheth over, and he in remainder enters, and the entry is adjudged lawfull; for the recovery is a forfeiture, and the remainder may enter, for it is the common assurance; as if tenant for life had levied a fine, &c. and suing of execution, doth not toll the entry of the remainder, and a writ of error was sued, and the plaintiff released the errors.

Porters Case, 34 & 35 Eliz. fo. 22.

32 H. 8. P. devised a house to his wife and her heirs, upon condition, that she by advise, &c. with all convenient speed, after his death, should assure it, &c. for maintenance of a free school, &c. for ever, and dies, 32 H. 8. the wife enters, and 3 E. 6. leases to A. for years, the heir of P. enters, and his entry adjudged lawfull; because 23 H. 8. extends not to good uses, nor doth it make the conveyance void, or give entry, but makes the use void: and admit the use void, yet the condition is not, for counsel may devise, &c. as to have a corporation by patent, and license to assure, and therefore the wife ought to have performed it.

Any man at this day may give lands, tenements, or hereditaments to any person or persons for the finding of a preacher, maintenance of a school, maimed souldiers, poor people, reparation of churches, high-wayes, bridges, marriage of poor maids, or any other charitable uses. But it is good policy in every such feoffment or estate, to reserve to the feoffer and his heirs any small rent, or to expresse some small sum of money for the consideration of the cause before recited.

Alton Woods Case, 42 Eliz. fo. 40.

H. 8. seised of an estate tail to him, and the heires males of his body, and of a fee expectant, grants in tail, and dies without issue male; adjudged that the grant is void; for the king had an estate taile in possession, by which he might grant a lawfull estate for his own life, and a fee, by which he might grant an estate tail by special recital. And these words (*ex speciali gratia, &c.*) shall not produce a strainable construction against the rules of law, or *in deceptionem regis*.

Capels Case, 23 Eliz. fo. 62.

A. tenant in tail, the remainder to B. in tail, B. grants a rent charge, A. suffers a common recovery, and dies without issue, the grantee distraines, the alienee of A. brings a replevin; adjudged for the alienee by all the justices of *England* that a common recovery against a tenant in tail shall bind not only the remainder, and all leases, charges, &c. granted or made by him in remainder; but also the reversion, and all leases, charges, &c. granted by him in reversion.

Archers Case, 39, 40 Eliz. fo. 66.

LAND was devised to the father for life, the remainder to the next heir male of the father, and to the heirs male of his body; the deviser dies, the father infeoffs J. S. with warranty. First it was resolved by *Anderson and Walmesly, et tot. Cur.* that the father had but only an estate for life, for that he had an expresse estate for life demised unto him, and the remainder is limited to his next heir male in the singular number, and his right heir male may not enter for the forfeiture in his life, for he cannot be heir so long as he liveth. Secondly, it was resolved, that the remainder to his right heir is a good remainder, although he cannot have a right heir during his life, but it sufficeth that it vesteth *eo instanti*, that the particular estate determineth. *Dyer, 14 Eliz. fo. 309.* Thirdly it was resolved, which was the principal point in this case, *per tot. Curiam*, that by the feoffment of the tenant for life, the remainder was destroyed, for every contingent remainder ought to vest, either during the particular estate, or at the least, *eo instanti* that the particular estate determineth; for if the particular estate be ended or determined in deed or in law before the contingency fall, the remainder is void. And in this case, by the feoffment of the father, his estate for life was determined by condition in law, which cannot be revived by any possibility; for this cause the contingent remainder is void, for by the feoffment no right of the particular estate remaineth; and the better opinion was, that the warranty binds the remainder, though in abeyance.

Bredons Case, 39, 40 Eliz. fo. 76.

TENANT for life, and the remainder in tayl, joyn in a fine come *ceo*, &c. to A. who renders a rent charge of 40*l.* a

year, to tenant for life, the remainder dyes without issue, the second remainder in tayl enters, tenant for life distrains for the rent, adjudged he may, and that the rent remains, after the death of tenant in tayl without issue, during the life of tenant for life ; the fine was no discontinuance, for every one gave that which he might lawfully give, and 'tis no forfeiture by tenant for life, for the law construes this, first, to be a grant of him in remainder, and after the grant of tenant for life, *ut res magis valeat*, &c. If tenant for life and the first remainder in tayl make a feoffement, 'tis no discontinuance, though the first remainder in tayl dies without issue, nor is it a forfeiture, but the feoffee shall hold it during the life of tenant for life, but if it be without deed, then 'tis a surrender of tenant for life, and the feoffement of the remainder, *ut res magis valeat*, &c.

Corbets Case, 42 Eliz. fol. 84. of Perpetuities.

C. covenants to stand seis'd to the use of himself for life, and after to the use of A. his eldest son, and the heirs males of his body, the remainder to the use of B. his second son, and the heirs males of his body, &c. And if A. or his issue, &c. shall attempt, &c. to alien, &c. by which any estate shall be barred, &c. that after such attempt, and before any act executed, the use and estate of him so attempting, &c. shall cease only as to him so attempting, in the same degree as if he were naturally dead, & not otherwise, and that then it shall be immediately to such persons, to whom it should come by the intent of the indenture, &c. C. dyes. A. suffers a recovery, B. enters, &c. adjudged he could not, for this proviso is repugnant, impossible, and against law, for the death of tenant in tayl, is not a cesser of the estate tayl, but death without issue males : And by this reason the issue should have it in the life of the father, &c. And for every descent, &c. death natural or civil, is requisite, and 'tis not material, though tenant in tayl had no issue at the time of the breach, for 'twas repugnant at the beginning, and the estate tayl doth not commence by the having of issue, and a gift in tail upon condition that if the donee dies, his estate shall cease, is a void condition. Also the proviso is void for the uncertainty, as a gift to two, *et hæredibus* is void though a warranty be made to them and their heirs, and in *Fermine* and *Ascotts Case*, the like proviso was adjudg'd void ; for be the proviso a condition or a limitation, the intire estate ought to be defeated by it, and an estate in land cannot cease for part, and continue for the residue, nor cease for

one person and continue for another, nor cease for a time and revive after. The like judgment was betwixt *Chomly* and *Humble*, but the parliament, or law, may make an estate void as to one, and good to another, as tenant in special tail levies a fine, the issue is barred, not the wife, so a release by the demandant to the vouchee is good, not by a stranger, so, if an executor surrender a term, to one respect 'tis extinct, to another 'tis assets, &c. And uses are within the statute *de donis*, though it speaks only of lands and tenements; and there shall be a *possessio fratris*, &c. of them, for they are guided by the rules of the common law. *Richil* in the time of R. 2. and *Thurning* in the time of H. 4. Justices, intended to make a perpetuity, but could not.

Shelleys Case, 23 Eliz. fo. 94.

EDWARD SHELLEY leased for years, and after covenanted to suffer a recovery, which should be to the use of himself, and after to the use of A. for 24 years, and after to the heirs males of the body of the said E. S. and the heirs males of the said heirs males, &c. E. S. dies 9 of *Octob.* the first day of the term, in the morning betwixt five and six o'clock, the recovery passes the same day, and an *habere facias seisinam* awarded, the recovery was executed the 19 of *Octob.* 4 *Decemb.* the wife of the eldest son (before dead) of E. S. was delivered of a son, named *Henry*; *Richard*, the second son of E. S. entered, and made a lease, &c. *Henry* entred upon the lessee, who brought an *eject. firma*, and judgement was given for the defendant, and 'twas resolved, that if tenant in tail suffer a common recovery, and die before execution, that execution may be sued against the issue, for the intended recompence, in favour of the common assurance, resolved that the reversion in judgement of law is not in the recoveror before execution sued, for the iudgement is, *quod recuperet seisinam*, which cannot be executed till entry or claim, as 'tis of a common, &c. granted upon condition; for when a man may enter, or claim, the law will not put things in him, till entry or claim. The third and great point resolved was, that the uncle is in, as by descent, though he shall not have his age, nor be in ward. 1. Because the recovery being the original act, had its essence in the life of E. S. to which the execution hath retrospect. 2. Because the use might have vested in E. S. if he were in life. 3. Neither the recoverors by their entry, nor the sheriff by making execution, may make

an inheritance to whom they please. 4. Because the uncle claimed the use by the recovery and indenture, and by words of limitation, not purchase.

Albanies Case, 28 Eliz. fo. 111.

A. by indenture infeoffed B. of two acres, to the use of A. for life, the remainder in tail to C. the remainder in fee to D. with a proviso if E. die without issue, that A. at any time by indenture sealed, &c. in the presence of four, &c. may alter, &c. any use, &c. A. of the one acre, infeoffes F. and for the other acre, A. by indenture renounces, surrenders, releases, &c. to B. C. and D. the said power, condition, authority, &c. E. dies without issue, A. by indenture in presence of four, revokes the first uses, and limits new; resolved that by the feoffement, the power to revoke, as to limit new uses, was extinct, and by *Wray*, Chief Justice, the future power may be released, as a condition subsequent, though the performance or breach cannot be done without an act precedent, but as to this point the court did not give their resolution; but the whole court agreed, that if the power had been present, (as 'tis usuall,) this might be extinct to any one, who hath a freehold in possession, reversion, or remainder. 'Twas moved (if the future power could not be released) whether it might be defeated by the words of defeasance, both being executory, and 'twas said that in all cases, when any thing executory is created by a deed, that the same thing, by consent of all parties to the creation, by their deed may be nullified, as a warranty, recognizance, rents, charge, annuities, covenant, &c. And of the same opinion was *Wray*, Chief Justice, and the whole court, and iudgement given according.

Chudleighs Case, Or the Case of Perpetuities, fo. 120.

SIR RICHARD CHUDLEIGH was seised in fee of the mannor of D. and had issue four sons, A. B. C. D. and 26 *April*, the third and fourth of *Philip* and *Mary*, infeoffed E. F. &c. in fee, to the use of himself, and his heirs of the body of G. then wife of H. and after to the use of the performance of his will, for ten years immediately after his death, and after to the use of the feoffees, and their heirs, during the life of A. the eldest son, the remainder to the use of the first issue male of the body of A. and the heirs of the body of the

first issue male, and so to the second issue male, the remainder to the use of B. the second son, and the heirs of his body, the remainder to C. &c. the remainder to D. &c. the remainder to the right heirs of himself. Sir Richard Chudleigh dyed without issue of the body of G. 10 of the Queen, the feoffees (C. living) by deed infeoffed A. in fee, without consideration, he having notice of the first uses. A. hath issue a sonne, named S. and after I. and after infeoffes Sir I. C. with warranty, S. dyed without issue, &c. I. enters, &c. agreed by all the iustices and barons but two, that the feoffment made by the feoffees (which had an estate for life) devests all the estates, and the future contingent uses also; and though A. had notice of the first use, 'tis not material, because the ancient uses were devested, and this new estate cannot be subject to the ancient uses, which rose out of the ancient estate, agreed that 27 H. 8. doth not extend to destroy uses, otherwise than by execution, and transferring the possession to them, agreed by the most, that 27 H. 8. doth not transferre the possession to any use, but only to uses *in esse*, which doth appear by the statute, for there ought to be a person *in esse*, seised, and also a use *in esse*, for if there be only a possibility of a use, there cannot be an execution of the possession to the use, the statute says, *That the estate shall be out of the feoffees, & that the estate shall be in such person which hath the use.* So that no estate of the feoffees shall be transferred in abeyance; and upon this twas concluded that contingent uses, or in possibility, may be destroyed or discontinued, before that they come *in esse*, as they might at common law; so the remainders limited in use here shall follow the rule and reason of estates executed in possession by the common law, and if the estate for life here had been determined by death, before the birth of the sonne, the remainder in future should be void, though the sonne were born after, for a remainder ought to vest during the particular estate, or *eo instanti*, when it ends. And 'twas holden by all, that if the contingent use here had come *in esse*, without alteration of the estate of the land, it should be executed by the statute of 27 H. 8. Also it was holden by most, that 27 H. 8. against the expresse letter of it, shall not be taken by equity, because by preservation of contingent uses, mischiefs intended to be prevented, shall be preserved, and greater introduced. Popham, Chief Justice, said, that by 27 H. 8. some uses *in esse* are executed presently, uses *in futuro* agreeable to law are executed if they come *in esse* in due time, but uses not agreeable to law are extirpated, for the intention of the statute was, to restore the ancient common law. Five other points adjudged, besides the prin-

cipal matter. 1. When tenant for life (the remainder being in tail to A.) enfeoffs the reversioner, 'tis a forfeiture, for it divests the estate in remainder; so if there be tenant in tail, the remainder in tail, &c. and the diversity is, when the privity and estate is sole and immediate, when not. 2. If A. hath issue, B. and C. infants, and a lease is made to A. for life, the remainder to B. in tayle, the remainder to C. in tayle, A. is disseised, and releases to the disseisor with warranty, and dies, this descends upon B. within age. B. dies, the warranty descends upon C. within age, C. comes to full age, and three years after enters, his entry is lawfull, for he might enter in the life of his ancestor, and if he doth not enter, yet the warranty shall not bind him, otherwise it is, when he is put to action, and *caveat*, that after his full age, he doth not suffer a descent before entry. 3. If a disseisor, &c. who hath a defeasible title in a mannor, grant a voluntary estate by copy, (being forfeited or escheated to him,) this grant shall not bind him that hath right, after a re-continuance of the mannor; but admittances, which a disseisor, &c. makes to copyholds are good, for they are in a manner judicial acts, and shall bind the disseisee. 4. That an estate made to one and his heirs, during the life of B. is but an estate for life, upon which a remainder may depend. 5. That an estate made to A. and his heirs of the body of *Jane S.* is an estate tail, against the opinion of *Ascugh.* 20 H. 6. 36.

Anne Maiowes Case, 35 Eliz. fo. 146.

FEOFFOR and feoffee upon condition, by deed joyned in a grant of a rent charge to C. the condition is broken, the feoffor re-enters, the grantee distrains, the feoffor brings a replevin. Resolved, that the rent remains; to the objection that 'tis the grant of the feoffee, and the confirmation only of the feoffor, and a confirmation cannot make a conditional estate absolute, nor alter the quality of it, except it enlarge it: as if a feoffor confirm the estate of the feoffee upon condition, before the condition broken, it doth not make it absolute. Answered, and agreed by the court, that there is a diversity, when the estate of him to whom the confirmation is made is upon an expresse condition; there the confirmation doth not toll the condition; but if such a feoffee infeoff another without condition, there a confirmation to the second feoffee extincts the condition. Feoffee upon condition grants a rent in fee; the feoffor confirms it to him and his heirs, and after enters for condition broken, yet the rent remains, and by

Littleton every fee-simple land may be charged one way or other, *concurrentibus his*, &c. and the case 11 H. 7. is all one with our case, and here 'tis the stronger, because the grant and confirmation were by the same deed, so that the rent was never subject to any condition.

The Rector of Chedingtons Case, 40 & 41 Eliz. fo. 153.

2 E. 6. the rector of *Ched.* demised the rectory to *El. Elderker* for fourscore years, if she should live so long; and if she dyed within the said term, or aliened, that then her estate should cease, and then by the same indenture demises the premises to *R. E.* for so many years as shall remain unexpired after the death or alienation of *El.* for the residue of the term of fourscore years, if he shall live so long, without alienation, &c. And if he dye, or alien within the said term, then his estate shall cease; and then by the same indenture he grants the premises to *W.* for so many years of the said term of fourscore years as remain, if he lives without alienation, and if *W.* dies, or aliens within the said term, that his estate shall cease, and then he grants, &c. during so many of the fourscore years, which shall be unexpired to *T.* his executors and assigns, which indenture and estate was confirmed by the patron and ordinary; the rector dies; *T.* dies; *W.* dies; and 17 *Eliz. Ellerker* dies, after *R.* enters, and dyes, 18 *Eliz.* the executor of *T.* enters, and assigns to *J. S.* the successor of the rector enters, and leases to *B.* who upon ouster, brought an *ej. firmæ*. Resolved for the plaintiff, and that the lease to *T.* is void, Argued for *T.* that his demise was good, and a difference taken betwixt *terminum annorum*, and *tempus annorum*, as in this case of the demise to *T.* during so many years of the fourscore years, &c. not of the terme of fourscore years, if a lease be made for 21 years, and after another lease, to commence from the end and expiration of the said term of years, and after the first lease is surrendered, the second term shall commence presently; not so, if it were from the end of the said 21 years. Resolved that the demises to *R.* and *W.* are void, because the terme that *El.* had was *sub modo*, if she should so long live, which is determined by her death, *ergo*, no residue can remain to *R.* and *W.* and so 'twas adjudged between *Green* and *Edwards*, and the court agreed the diversity betwixt the demises to *R.* and *W.* and the demise to *T.* 'twas argued that the demise to *T.* was void. 1. Because that the lessor had not power to contract for the land during the four-

score years, for he had but a possibility to have the land again during the fourscore years. viz. if *El.* dyed, which possibility cannot be demised, but the court delivered no opinion to this poynt. 2. That the lease to *T.* was void, for the incertainty how many years should be behind, at the death of *El.* a termor grants to *B.* so many years as shall be behind *tempore mortis sue*, 'tis void. *Locrofts* case adjudged, a man possessed of a term of 90 years upon marriage of his son, demised the land to his sonne for 70 years to commence after his death, the lessor dyes, the lease was adjudged good, because here he demised the land for 70 years, which is certain, in which this differs from 7 E. 6. which diversity was agreed by the whole court. 3. That 'twas void because he dyed in the life of *El.* so that the incertainty cannot be reduced to a certainty in his life time, and so cannot rest in the executors, a lease to one for so many years, as his executors shall name, is void. *Note*, a diversity betwixt a covenant and agreement, which is perfect and certain, though it takes effect in possession, upon a future matter precedent, and a covenant and agreement incertain, which is to be reduced to a certainty by matter *ex post facto*, for in the first case, the estate is bound presently, in the other not, which was agreed by the court. 4. It was moved, if *T.* had been in life, the demise could not rest in him; *T.* dyed before *R.* or *W.* and *R.* survived *El.* and by the expresse condition precedent, *R.* could not take, except *El.* dyed within the term, and *W.* could not take except *R.* dyed within the terme, and this is as much as to say, that if *R.* dyes before *El.* and *T.* cannot take, except *W.* die in the life of *El.* and *R.* survived *El.* So that both precedent contingencies fail, viz. the death of *R.* and *W.* in the life of *El.* and though the demise to *R.* and *W.* are void, yet the limitation precedent (viz. the death of *R.* and *W.* in the life of *El.*) to the demise to *T.* is not void, for his interest may depend upon both the contingencies, for so was the intention of the parties, and this was affirmed by the whole court, by *Popham*, Chief Justice. The lease to *T.* was void for another cause, for it cannot commence upon a contingent, which depends upon another contingent; as here the demise to *T.* depends upon the contingent annexed to the demise made to *W.* and the demise to *W.* depends upon a contingency annexed to the demise to *R.*

Digges Case, 42 Eliz. fo. 173.

C. DIGGES was seised of the land in question, and other lands in fee, and by indenture, 6 *Maii*, 10 of the queen covenanted (in consideration of marriage betwixt him and his wife, and for the advancement of T. their sonne, and for two hundred pounds paid to him before marriage) that he and his heirs would stand seised to the use of himself for life, and after to T. in tail, and after to the use of himself in tail; with a *proviso* (for the considerations aforesaid, &c.) that it should be lawfull for him, at any time during his life, with consent of certain persons, by indenture to be inrolled in any of the kings courts, to revoke any of the uses, or estates, and for to limit new uses. 6 *Maii*, 12 of the queene, C. by consent, &c. by indenture inrolled in the chancery, revoked the uses and estates aforesaid, in part of the land, and limited the use of it to him and his heirs, after 20 *Sept.* 13 of the queen, by indenture with consent, &c. inrolled in banck, *M.* 13 and 14 of the queen, declared that for the payment of his debts, that from the time of the inrollment of this deed in chancery, all the uses in the first indenture should be void, and that the land should be to the use of himself in fee; after C. 26 *Octob.* 14 of the queen by indenture covenanted for to levie a fine of all his land, part of which should be to the use of himself and his wife, and his heirs: which fine was levied the same term, after the indenture dated 20 *Sept.* was inrolled in chancery, after C. enters, and makes his claim, and whether C. dyed seised in fee of the land mentioned in the deed of revocation of 20 *Sept.* was the question. Adjudged, 1. That C. D. might revoke part at one time, part at another, till he had revoked all; but he can revoke the same part but once, except that he hath a new power, &c. to uses newly limited for these words (*at any time*) amount to (*from time to time, &c.*) 2. That where the revocation is to be by deed indented to be inrolled, this is as much as to say, as by deed indented and inrolled, and till inrolment no revocation shall be, for otherwise perchance none shall be inrolled. 3. That was no perfect revocation by the indenture of 20 *Sept.* till the deed were inrolled in the chancery: for though that the proviso of revocation in the first indenture shall be satisfied with an inrollment, in any of the kings courts, yet for that the indenture of revocation it self, limits the revocation to take effect after the inrollment in chancery, it ought to be so. 4. That the fine levyed before the inrollment in chancery (which was before the revocation) hath extinct the power; see *Albanies* case before adjudg'd, and

Popham, Chief Justice, said, that without question such a power might be released, for 'tis not meerly collateral, but savours and tastes of the estate of the land, which all the court agreed. 5. If the fine had not been, the ancient uses were determined, without entry or claim, because he himself was tenant for life of the land, and the act of revocation is as strong as claim; and this point was agreed in the *Earl of Salops* case. 6. By the same conveyance that the ancient uses are revoked, others may be raised without claim, or other act, and the law adjudges a priority of operation. *Whites* case adjudged accordingly.

Mildmayes Case, 24 & 26 Eliz. fo. 175.

A USE cannot be raised by any covenant, proviso, or bargain, &c. upon a general consideration, and therefore if a man by deed indented & inrolled, &c. for divers good causes & considerations, bargain and sell his land to another, and his heirs, *nihil operatur inde*, for no use shall be raised upon such general considerations, for it doth not appear to the court that the bargainor had *quid pro quo*. But the bargainee may averre that money or other valuable consideration was paid or given, if in truth it was so, and the bargain and sale is good.

It was resolved, that when uses are raised by covenant in the consideration of advancement of any of his blood, and after in the same indenture a proviso that the covenantor may make leases for years, &c. that the covenantor in this case may not make leases for years to his son, daughter, or any of his blood, much lesse to any other person, because that the power to make leases for years was void, when the indenture was sealed and delivered. For the covenant upon this general consideration will not raise any use, and no particular averment in this case may be taken; but if the uses be limited upon a recovery, fine, or feoffment, there needeth not any consideration to raise any of the uses. Resolved, that the words (*other consideration*) cannot comprise any consideration expressed in the indenture before the proviso, for (*other*) ought to be in quality, nature, and person, different, and advancement of his daughter is a consideration mentioned before.

Anthony Mildmay, brought an action of the case against *Roger Standish*, for saying that lands were lawfully assured to *John Talbot* for 1600 years, and that he was lawfully possessed of the said term; whereas in truth the said lands were

not lawfully assured for the said term, nor the said *John Talbot* was lawfully possessed of the interest thereof. And so for slandering of the title by speaking of the words, *Mildmay* brought an action. *Standish* justified the words, and shewed the title of *Talbot*, and it was adjudged that the action was maintainable and good, although that *Talbot* had a limitation of the land by will, which was the reason that *Standish* (being a man not learned in the laws) affirmed the words; yet because he took upon him the notice of the law, and medled in a matter that did not concern him, iudgement was given for *Mildmay*: *Et ignorantia iuris non excusat*

THE SECOND BOOK.

Mansers Case, 26 Eliz. fo. 3.

IF a man be unlearned & cannot read, and be bound to do an act of sealing assurances, writings, &c. upon tender, &c. he is not bound to seal and deliver any such writing, if there be not some ready which may read the deed if the party so require it, and in the same language and tongue that he understandeth. *Ignorantia duplex est, facti & juris*, & ignorance in reading, or of the language. *Quæ sunt ignorantia facti* may excuse, but *ignorantia juris non excusat*, and if it be read unto him, he may not have a reasonable time to shew it to his counsell learned, to see whether it agree with his bond or covenant, for he must seal it at his peril, or if the same be truly expounded to him, it is good enough. But if it be read admissè, or declared contrary to what it is, and thereby the illiterate man is deceived, he may very well plead *non est factum*; for the law saith it is not his deed; and so it was adjudged in *Throughgoods Case*, being the third case in this second Book. Resolved, that if a man be bound that a stranger shall do an act, in such case he takes upon him that he shall do it at his peril; for he which is bound takes more upon him for a stranger than for himself in many cases. If a man plead that he hath kept a man indemnified, &c. he ought to shew how, otherwise, where he pleads in the negative, *non fuit damnificatus*.

Goddards Case, 26 Eliz. fo. 4.

AN obligation dated the fourth of *Aprill, an. 24 El.* and delivered as the deed of the party, 30 *July, an. 23 El.* adjudged the deed of the party; for though the plaintiff in pleading cannot allege the delivery before the date, because he is estopped, yet a jury which are sworn to speak the truth shall not be estopped. The date of a deed is not the substance of the deed. For if it want date, or have an impossible date, as the 30 *February*, the deed is good. For there are three things of the essence or substance of a deed, (*viz.*) wri-

ting in paper or parchment, sealing and delivery. And if it have these three, although it want *in cujus rei testimonium sigillum suum apposuit, &c.* yet the deed is good; and when a deed is delivered, it takes effect by the delivery, not by the date.

Throughgoods Case, 26 Eliz. fo. 9.

RESOLVED, that 'tis not material whether the party to whom the deed is made, or another by his procurement, or a stranger of his own head, reades the writing in other words than the writing is, so that he that seals it be a lay-man, and (without covin in him) deceived, and the pleading of it is always general, without shewing by whom 'twas read; and A. shall avoid an obligation to B. by pleading that he did it by menace of C. Resolved, that such a lay-man is not bound to deliver a deed, if no body be present that can read it in such language as he can understand, and if it be read in other words, it shall not bind him, and 'tis at the perill of him to whom 'tis made, that the very effect and purport of it be declared, if it be required, but if he do not request it, he shall be bound by it, though it be made contrary to his meaning. Resolved, that it shall not bind, if the effect be declared in other words then it is, as if the deed had been read in other words. Two justices, a feoffment of two acres is read as of one, it shall not bind: see *Mansers Case* before.

Wisemans Case, 27 Eliz. fo. 15.

TENANT in tail of certain lands, the remainder to another in fee, he in remainder by deed indented and inrolled in consideration of bloud, &c. as for other good considerations, doth covenant to stand seized of the said lands to the use of himself and of the heirs males of his body. And for default thereof to the use of the queen, her heirs and successors. After the tenant in tail in possession suffereth a common recovery with voucher. And whether it was a barr to the issue in tail was the question; and it was adjudged that the issue in tail was barred, for good considerations are too general to raise any use, without special averment that valuable or other good consideration was given. Resolved, that the land should continue in his name, and bloud is not a consideration to raise a use to the queen, though the limitation to her were for the preservation of the tail, against discontinuances and barrs, for there wants *quid pro quo*. Resolved, if he had said in con-

sideration that the queen is the head of the weale publique, and hath the care and charge, as well to preserve peace, as to repell hostility, yet 'tis no good consideration, for kings *ex officio* ought to govern their subjects, in tranquility, which is implied in the word (*king.*) And admit the consideration hath been sufficient to raise a use to the queen, yet that would not preserve the estate taile by force of the act 34 H. 8. for no estate taile is preserved by the said act, except the same estate taile be of the creation or provision of the king, and not where the estate taile is given or created of a common person without provision of the king, as may appear by the preamble of the act. Resolved, that before the statute of 34 H. 8. a common recovery barred a taile created by the king.

Lanes Case, 28 & 29 Eliz. fo. 16.

THE queen seised of a mannor in right of her crown, by her steward granted copy-hold lands, parcel thereof, to one by copy, according to the custom in fee. And after the queen under the exchequer seal made a lease of the same lands to another for 21 years, who granted the same terme to the copy-holder, and after the queen reciting the lease for years, granted the reversion thereof in fee, the term of 21 years expired. The patentee of the reversion entred upon the copy-holder, and the entrie was adjudged good. Resolved, that the lease under the exchequer seal was good, by the usage there, for the course of every court is as a law, of which the common law takes notice, without alleging of it in pleading; and every court at *Westminster* is bound to take notice of the customes of other courts, otherwise of courts in the countrey: and the order of exchequer is to make leases by (*committimus* such land.) Resolved, that the estate of the copy-holder was determined by the acceptance of the lease for years; and so it was adjudged against the copy-holder, notwithstanding that the copy-holders estate is taken to be but an estate at will, yet the custome hath so established the estate of the copy-holder, that he is not removeable at the will of the lord, so long as he performes his customes and services: and by the same reason the lord cannot determine his interest by any act that he can do. And so it hath been adjudged many times. And the acceptance of this lease was the proper act of the copy-holder. Resolved, that by the severance of the free-hold from the mannor, the copy-hold estate is not extinguished.

Baldwyns Case, 31 Eliz. fo. 23.

THINGS which lie in grant, and take the essence and effect by delivery of a deed, without other ceremony, as rent or common out of lands, &c. by the premises of the deed to one and his heirs, *habendum* to the grantee for years, or life, this *habendum* is repugnant to the premises, for the fee passeth by the premises by the delivery of the deed, and therefore the *habendum* is void. And when a man giveth lands by deed in fee by the premises, *habendum* to the lessee for life, there the *habendum* is void, and when livery is made, the effect of the deed shall be taken the most strongly against the feoffor, and the best for the feoffee.

When a ceremony is requisite to the perfection of an estate in the premises limited, and to the estate limited in the *habendum*, no ceremony is requisite but only the delivery of the deed, although the *habendum* be of meaner estate than the premises, the *habendum* shall stand good and qualifie the generality of the premises, as a fee granted in the premises, *habendum* for years, it is for years, and no inheritance. *Note*, There is a diversity betwixt the estate implied in the premisses, and expressed; as if A. grant a rent to B. this is an estate for life, but if the *habendum* be for years, this is good, and qualifies the implication of the premisses.

Case of Bankrupts, 31 Eliz. fo. 25.

RESOLVED, that a grant or assignment of goods, by a bankrupt after the commission awarded, which is matter of record, of which every one ought to take notice, and though to a creditor, in satisfaction of his debt, is void, and that a sale of such goods, by the commissioners, is good. Which sale by the statute of 13 of the queen ought to be equal to every one, *rate and rate like, according to the quantity, &c.* And the court resolved that the proviso in the said statute, concerning gifts *bona fide*, doth not make any gift good, but excludes them out of the penalty, &c. Commissioners may sell, by deed, without inrolment, and though they have not seen the goods, agreed, that the distribution ought to be several not joynt, for the one debt may be greater than the other, and in this case the jury found that the commission-

ers sold the goods to three creditors joyntly, but further, that the bankrupt was indebted to them in 273 pounds, which shall be intended a joint debt, and so good. Resolved, that the act giveth benefit to such as will come, and not to them that refuse; & *vigilantibus*, & *non dormientibus*, *jura subveniunt*; and every creditor may take notice of the commission, being matter of record.

Bettisworths Case, 33 Eliz. in Communi Banco, fo. 31.

A LEASE for years was made of one messuage, one close called *Raynolds*, and of divers other lands in Dale, and afterwards (the lessee being in the house) the lessor entred into the same close, and maketh a feoffment of the messuage, and of the lands therewith demised, and maketh livery in the same close, and afterwards the lessee reentreth into the said close. And if this was a good feoffment, and livery of seisin of the said close, (the lessee, nor any for him, being in the said close,) was the question. And it was adjudged that the livery and seisin was voyd, as well for the close as for the messuage, and the other land therewith demised; for the possession of the messuage, which is his castle, is a good possession of the lands therewith demised, and it matters not whether livery be made on the land within view of the house, or not. When a man maketh a feoffment of a messuage *cum pertinentiis*, he departeth with nothing thereby, but that which is parcell of the house, as buildings, curtelage, and gardens.

If a lessee for years makes a lease for a certain term of any parcell, and so divides the possession thereof from the residue, (if of this parcell so severed,) livery be made, the possession in the residue of the first lessee is not any impediment to the livery of this parcell; otherwise if a lessee make a lease at will of any parcell, there his possession of the residue shall hinder the livery made in this parcell; and with this judgement agreed all the other justices and serjeants of Serjeants Inne in *Fleet-street*.

Doddingtons Case, 27 Eliz. fo. 32.

KING H. 8. *ex certa scientia*, &c. granted to A. for 300l. *omnia illa messuagia in tenura Johannis Brown*, situate in Wells, nuper prioratini de W. Spectant. And in truth the lands lye in D. in this case 'twas resolved that the grant was void by the common-law, as well in case of a common per-

son as the king, because the grant is general, and is restrained to one certain village, and the grantee shall not have any lands out of that village, to which the generality of the grant is referred, for this pronoun *illa*, hath his necessary reference as well to the town, as well as to the tenure of I. B. for if either the one or the other fail, the grant is void. And so it was adjudged, *per tot. cur. de banco regis*. Resolved, also, that this grant was not holpen by the statute of 34 H. 8. for no grants are holpen by this statute, nor by any act of confirmation, but such as comprehend convenient certainty.

1. *Quia generale nihil certum implicat*. And here no tene-ments are mentioned to be granted, because the general grant being intire, was referred to a falsity, and therefore it cannot be said that the town was mis-named, and great inconvenience would follow, if, &c. for the king should be deceived, but the statute helps when there is convenient certainty, as a mannor, farm, land, known by a certain name, or containing so many acres, &c. So that it may appear what things the king intended to pass. *Note*, tis the most sure way for the patentee to express as much as he can in certainty, before the generall words.

Sir Rowland Heywards Case, In cur. Wardor. 37 Eliz. fo. 35.

SIR ROWLAND HEYWARD seised of a mannor in demesns and rents, in consideration of money, doth demise, grant, bargain and sell to A. the said mannors, lands, tene-ments, and the reversions and remainders, with all rents reserved upon any demise, to have and to hold to A. and his assigns after the death of the lessor for seaventeen years, rendring a rose, the indenture was inrolled, and after the lessor by indenture doth covenant with B. to stand seised of the premises, to the use of himself and the heirs of his body, and no attornment was made to A. The question was, what passed to A? and it was resolved by *Popham* and *Anderson*, Chief Justices, and the court, that A. may have his election either to take the same by demise, at the common law, or by bargain and sale, *per statutum* 27 H. 8. without attornment, for it was one entire demise, and bargain of one mannor without any fraction or division thereof, and this election remaineth to A. and his executors and assigns, for here is not election to claim one of two severall things by one title, but to claim one thing by one of the two severall titles, for where the things are several, nothing passeth before election, and the election must precede; but when one thing passeth,

the election of the title may be subsequent. For if I have three horses, and do give to you one of them, the property commenceth by election, and must be made in the life of the parties.

The bi. of *Sarum* had a great wood of 1000 acres, called *Berewood*, and infeoffed another of one house, and seaventeen acres, parcell of the wood, and made liverie in the wood house, nothing passeth of the wood before election, and the heir of the feoffee may not make election. *Bullocks case*, 10 *Eliz. Dyer*.

In case where election is given of two several things, he which is the primer agent, and that ought to do the first act, shall have alwaies the election. As if a man grant a rent of twenty shillings, or a robe, the grantor shall have the election, for he is the primer agent, either by paying the one, or delivering the other. If a man make a lease rendring twenty shillings or a robe, the lessee shall have the election, *causa quæ supra*; but if I give unto you one of my horses in my stable, there you shall have the election, for you are the primer agent, by taking or seising one of them, and so of twenty trees in my wood. Note for elections these diversities. 1. When nothing passes to the grantee, &c. before the election, there it ought to be made, in the life of the parties; but when the estate passes presently, &c. the grantee, &c. his heir or executor may elect. 2. When the same thing passes, and the donee, &c. hath election, in what manner, &c. he will take it, the donee, heir, or executor may elect. 3. When election is given to several persons, the first shall stand. 4. When election is given of two several things, he which ought to do the first act shall have election. 5. When the thing granted is annuall, and to have continuance, there the election remains to the grantor (in case, where the law gives him election) as well after the day as before, otherwise tis when the thing is to be performed *unica vice*. 6. The feoffee, &c. by his act may forfeit his election; as if A. infeoff B. of two acres, *habendum*, the one for life, the other in tail, and he before election makes a feoffment of both; here the feoffor shall enter in which he pleases, for the wrong of the feoffee. 7. Though the lessees here enter generally, yet they may elect after; so, if one be executor and devisee of a term, and enter generally, &c. and after the lessees, in the principal case, made election for to take by bargain and sale, and had the rents.

*The Bishop of Winchesters Case, 38 Eliz. fo. 43.
In a Prohibition.*

RESOLVED, that at common law, none had capacity to take tithes but spiritual persons, or *persona mixta*, as the king, and regularly no meer lay-man was capable of them, (except in special cases,) for he could not sue for them in court christian, and regularly, a lay-man had no remedy for them till 32 H. 8. A lay-man may be discharged of tithes, at the common law, by grant, or by composition, but not by prescription, for it is commonly said in our law-books that a lay-man may prescribe, *in modo decimandi*, but not *in non decimando*. And the reason is, because he is not (except in special cases) capable of tithes at the common law, before the statute of 32 H. 8. *cap. 7*. And therefore without special matter shewing, it shall not be intended that he hath any lawfull discharge, and in favour of the holy church (although it may have a lawfull commencement) the law will not suffer this prescription *in non decimando*, to put it to the tryal of lay-men, which sooner will strain their conscience for their private benefit, than render to the church the duty which belongeth to it.

A spiritual person that was capable of tithes at the common law in pernancy may prescribe to be discharged of tithes generally, or to have a portion of tithes in the land of another.

Before the counsell of *Lateran*, every man might give his tithes to any spiritual person that he would; and if the lands of the bishop were discharged in his hands absolutely by prescription, the demising it to a lay-man cannot make it chargeable, and the bishop might reserve the greater rent.

And in discharge of tithes, the iudges of our law do know that the ecclesiastical iudges will not allow any such allegation, and therefore a traverse, *absq: hoc quod iudices placitum*, &c. *recusarunt* is insufficient, for the refusal is not material, for the party might have a prohibition before any plea pleaded by him, but in some case, the refusal is traversable, as 'twas adjudged in *Morris & Eatons* case, where 'twas pleaded that the plaintiff did not read the articles, &c. and that the ecclesiastical iudge refused this plea; but the truth is, a man may prescribe that he and all others whose estate he hath in the manor of D. time out of remembrance, have paid to the parson of C. for the time being, one certain pension yearly, for the maintenance of divine service there, in contentation of all tithes, renewing, or happening within the same manor, and prescribe in respect of the pension paid,

&c. to have all the tithes within, &c. and this was adjudged good in *banco regis*, *Mich.* 39 & 40 *El. Rotulo*, 199. And that a lay person may sue for the tithes, &c. for at the beginning it shall be intended that the lord was seised of the whole mannor, before any tenancy was derived out of the same, and then by composition or other lawfull means, the lord had all the tithes within the mannor, for the said pension paying to the parson, and the law intends it was for divine service, *et pro bono ecclesiæ*, the reason of which intendment is the continual usage, time out of remembrance. And upon such special matter, a man might have tithes, as appurtenant to a mannor, for he prescribes to a *que estate* in the mannor, and therefore cannot have them in *grosse*; but 'twas adjudged, *Winscombs* case, in a prohibition, that a man cannot prescribe generally in him, and all those, &c. to have tithes appurtenant to a mannor, without speciall matter shewn because tithes are due *iure divino*.

The Arch-bishop of Canterburies Case, 38 of the Queen, fo. 46.

A RELIGIOUS house in M. was given to E. 6. by the statute of 1 E. 6. a rectory which was impropriated to it was granted to the Archbishop of *Canterbury*, who leased to the defendant, and land within M. parcel of the said college, came to the Lord *Cobham*, and from him to the plaintiff, who shewes that the master of the college was seised of the said land and rectory, *simul & semel*, as well at the making of 31 H. 8. as of 1 E. 6. Resolved, that this college came to the king by 1 E. 6. only, for when 31 H. 8. speaks of dissolution, renouncing, relinquishing, forfeiture, giving up, (which are inferior means by which, &c.) or by any other means, cannot be intended of an act of parliament, which is the highest manner of conveyance that can be, and the makers would have placed this in the beginning if they had intended it. Bishops are not included within 13 of the queen, which begins with colleges, deanes, and chapters, &c. Also 1 E. 6. enacts, that all colleges by this parliament shall be in actual possession of the king, which last act being of as high nature as the first, it cannot come to the king by 31 H. 8. and it was never pleaded, that of colleges which came by 1 E. 6. the king was seised *vigore* of the statute of 31 H. 8. Resolved, that neither the act, nor the meaning of 31 H. 8. extends to other colleges than to those which came to the king by 31 H. 8. for it should be absurd that a branch of the act of 31 H. 8. should extend to a future act, of which the makers of 31, without a

spirit of prophecy, could not have foreknowledge: and the act of 31 concludes in as large manner as the late abbots, &c. which late, as it hath been agreed, extends only to those to be dissolved by 31. Resolved, (admitting that the college had come to the king by 31 H. 8.) that such a general allegation of unity of possession of the rectory, and the land with it, was not sufficient, for no unity shall be sufficient, but lawfull and perpetual unity of possession, time out of mind, as 'twas adjudged in *Knighly* and *Spencers* case; and that the general allegation of the plaintiff, that the master of the college at the making of 1 E. 6. held the land discharged, is not good, without shewing how, either by prescription, composition, or other lawfull means, as 'tis adjudged in the bishop of *Winchesters* case; otherwise if the land had come by 31, then by force of the said branch of discharge, such general allegation had been good. Resolved, that no ecclesiastical house, except religious, was within the statute of 31 H. 8. Resolved, that though 1 E. 6. saith that the king shall have the lands of colleges in *as ample and large manner as the said priests*, &c. enjoyed the same, yet these general words doe not discharge the land of any tithes, for they do not issue out of the land; for a prior had tithes against his own feoffment of the manor, and 'tis no good cause of prohibition, to allege unity of possession in a college which came to the king by 1 E. 6. as 'tis upon 31 H. 8. in abbeyes, &c. For the statute of 1 E. 6. hath no such clause of discharge of payment of tithes as 31 hath, and therefore such perpetual unity will not serve upon 1 E. 6. So 'twas likewise resolved betwixt *Green* and *Buffkin*.

Sir Hugh Cholmleys Case, 39 of the Queen, fo. 50.

TENANT in tayl, the remainder in tayl, the remainder bargains and sells the land, and all his estate to J. S. to have for the life of tenant in tayl, the remainder to the queen, &c. upon condition that the estate shall be void upon tender of 10l. Tenant in tayl suffers a recovery to the use of himself and his heirs, after the remainder tenders the ten pounds, &c. Resolved, the remainder to the queen was void. 1. Because the grantee for life for tenant in tayl took nothing, for 'tis a void grant, for the grantee shall never have any benefit by it, but such a grant of a reversion were good, for he shall have the services; but a lease for life of J. S. the remainder to I. H. for life of I. S. is good, for this may take effect by forfeiture of tenant for life; and remainder *dicitur, quasi terra remaneus*, which cannot be here, and the remainder must take effect when

the particular estate ends, & *vana est illa potentia, quæ nunquam venit in actum*. And the possibility for tenant in tayl to enter in religion, shall not make the remainder good, because 'tis remote, and it ought to be a common & *propinqua possibilitas*, which shall make the remainder good, as death, coverture, dying without issue; remainder to a corporation, which is not *in esse*, is void, though such be erected during the particular estate. 2. Because the law will never adjudge a grant good, by reason of such a sorrem possibility, for 'tis *potentia remotissima* & *vana*, and by intendment *nunquam venit in actum*. 3. Because the remainder being tenant in tayl, granted all his estate for the life of tenant in tayl, so that there is no remainder left in the grantor, but in such case the estate tayl is in abeyance. *Blithmans case*, 35 of the queen, agreed, tenant in tail covenants to stand seised to the use of himself for life, and after to his eldest sonne in tayl, the remainder to the son is void; for when he had limited the use to himself for his own life, 'twas as much as he could limit by law. Resolved, (admitting the remainder good to the queen,) that the common recovery hath barred the estate of the first grantee, and so the condition during his life; for 'tis out of the statute of 34 H. 8. being not of the gift of the queen, &c. as *Wisemens case* is before adjudged. A reversioner upon an estate tayl grants upon condition, a recovery barrs the reversion and condition, and, as *Capels case* is before adjudged, if the reversioner, or he in remainder, grant a lease, &c. and tenant in tayl suffer a recovery, the possession shall never be subject to such charges. Resolved, that the payment to the first grantee cannot divest the remainder out of the queen. 1. Because the condition, during the life of the first grantee, was discharged. 2. Because, he that takes benefit of a condition, ought to have the intire estate, with which he departed, which cannot be here, for the estate of the first grantee was barred by the recovery. 3. The tender to the first grantee was to the intent for to revest his estate, which cannot be, because 'twas barred and therefore the payment cannot divest the remainder out of the queen.

Bucklers Case, 39 & 40 Eliz. in *Communi Banco*, fo. 55.

TENANT for life, the remainder in fee, tenant for life maketh a lease for four years in *March*, 20 *El.* the lessee entred, tenant for life granteth the tenements aforesaid to C. to hold from the feast of Saint *John Baptist* next ensuing for life, after the said feast, the tenant for years attorns, the years

expire, C. enters, and maketh a lease at will to D. to whom the tenant for life levyeth a fine, he in remainder in fee entreth and maketh a lease to *Buckler*, the tenant at will entreth upon him, and *Buckler* the plaintiff bringeth an *ejectione firmæ*, and judgment was given for the plaintiff. In this case divers things were resolved. First, that the grant to C. was void, for the law maketh construction upon the whole grant, and an estate of freehold may not commence *in futuro*. The office of the premises of a writing, (*viz.*) feoffement, lease, &c. is to expresse the grantor, the grantee, and the thing granted. And the office of the *habendum* is to limit the estate; so that the general implication of the estate which should passe by the premisses is always controlled and qualified by the *habendum*; as a lease to two, *habendum* to the one for life, the remainder to the other for life, here the general implication of joyntenancy is altered, and the *habendum* is not contrary to the premises, for in the premises no certain estate is passed, and the grant being void at the beginning, the attornment after midsommer shall not make the reversion to passe. For *quod ab initio non valet, tractu temporis non conualescit*.

Resolved, that when the grantee entered, by colour of this void grant, he was a disseisor, but when the grant is good at commencement, but is to have its perfection by an act subsequent, as livery, or attornment, and the grantee enters before the perfection, &c. he is not a disseisor, but a tenant at will. And if the fine had been levied to the disseisor, *come ceo*, &c. he which had the right of the remainder might enter for a forfeiture, for a right of a particular estate may be forfeited, and entry given to him who hath but a right. Resolved, the fine being levied to tenant at will, 'tis a forfeiture, and he which hath the right of the remainder may enter, and the tenant for life, and at will, shall be estopped to say *quod partes finis nihil habuerunt*, and of such estoppells which are by matter of record, and trench to the dis-inheritance of those in reversion, &c. they shall take advantage, though strangers to the record (for they are privies in estate.) A disseisee levyeth a fine to a stranger, the disseisor shall hold the land in this case for ever, for the disseisee against his own fine may not claim the lands, and the conusee may not enter, for the right which the conusor had may not be transferred to him, but by the fine the right is extinct, whereof the disseisor may take advantage.

Beckwithes Case, 27 Eliz. fo. 56.

IF the husband and the wife levie a fine of lands, whereof they are seised in right of the wife, and the husband solely declare the use of the fine, this declaration shall bind the wife, if her disassent do not appear, although her assent to the limitation of the uses doe not appear, for it shall be intended (if the contrary doe not appear) that she joyned with him also, in the declaration of the uses of the fine. But if the husband declare one use, and the wife another use, they are both void : the declaration of the use insues the ownership of the land ; for the one, (*viz.*) the wife, is not *sui juris*, *sed sub potestate viri*, and hath the estate of the land, and the husband is *sui juris*, and hath not the estate ; and if a fine be reversed by nonage of the wife, all the estate shall be restored to the wife presently ; for all the estate passed from her by the fine, and so it was adjudged, *banco regis*, in *Worselys* case.

Resolved, that though the variation of the limitation be onely in one estate, and they agree in all the other, yet all is void. But if two joint tenants, or two having severall estates, vary, 'tis good for every of their parts, and shall be directed by their interests ; but if the variance had been in limitation of part of the land, and they had agreed in the use, it should be void for that part, and good for the residue.

Note, That though the husband might dispose of the land during coverture, yet, for the cause aforesaid, his declaration was void.

If a tenant for life, and B. in reversion or remainder, both levy a fine together, generally the use shall be to A. for life, the reversion or remainder to B. in fee, for either of them grants that which lawfully he may grant ; and either of them shall have the use, which the law vesteth in them according to the estate which they would convey over.

Winningtons Case, 40 & 41 of the Queen, fo. 59.

W. infeoffed B. upon condition to regive to the feoffor for life, the remainders to J. sonne and heir of the feoffor, the feoffor enters, and takes the profits, without agreement, or contradiction of the feoffee, and leases to D. for 21 years, and yet continues possession, the feoffee acknowledges a statute to J. the feoffor makes a feoffment to the use of himself for life, the remainder to his second sonne in tail, &c. and dyes, the feoffee enters, and infeoffs the sonne and heir, upon which

the second sonne enters, &c. Resolved, that though the intention was, that the feoffee should make an estate to him for his life, when he hath entered without agreement of the feoffee, 'tis a disseisin, and the rather, because as owner of the land he took upon him to make a lease for years. Resolved, that by the lease by indenture, he hath dispensed with the condition during the term. Resolved, that when the feoffor disseises the feoffee upon condition, and the feoffee acknowledges a statute, &c. this is no disability to cause the feoffor to enter, for the right of the feoffee is not subject to the statute; but when the feoffee in possession takes a wife, grants a rent, or acknowledges a statute, the land is presently subject, &c. And though upon entry he may be disabled, yet till then he is not, because the wife may dye, or the statute be released, and then he may enter and perform the condition; and the feoffor by his feoffment hath extinct the condition, so that the feoffee may enter, and when he hath infeoffed the eldest sonne, he hath done well.

Westcots Case in Communi Banco, 41 Eliz. fo. 60.

IF a man make an estate to three, and to the heirs of one of them, one of them in this case hath fee simple, and yet the joint estate continues, for it is all one estate, created at one time, and therefore the fee simple cannot drown the joynture, which taketh effect with creation of the remainder in fee: but when three jointenants are for life, and after one of them purchase the fee, or else the fee descends to him, there the fee simple doth drown the estate for life, for the estate was *in esse* before.

Note, By this resolution, if tenant for life grant his estate to him in the reversion, and a stranger, 'tis a surrender for the moiety, and the benefit of survivor not regarded; so the doubt in 7 H. 6. well resolved. Resolved, upon view of three presidents, that judgement should be given for the plaintiff, upon a demise made by husband and wife, without alleging it to be by deed.

Tookers Case, 43 Eliz. fo. 66.

JOHN ARUNDEL seised of lands in fee, maketh a lease thereof to A. and B. for their lives, and after grants the reversion to C. for his life, to which grant A. doth attorn being joyn tenant with B. and after A. by his deed doth surrender to C. all his estate, title, and interest, &c. and then dyeth, C. entereth claiming to hold in common with B. and whether his entry was lawful, or no, was the question, and judgement was given that it was lawfull, for the attornment of the one tenant for life, shall vest the entire reversion in the grantee, because the estate of the joynt lessees is intire, and every joyntenant is seised *per my & pro tout*, and by consequence the reversion, which is dependent and expectant upon this estate is entire also, and the attornment of the one joyntenant is the attornment of both. Attornment is a lawfull act: if one joyntenant assigne dower, 'tis good. Also, the attournement passes no interest from him that attournes, but perfects the grant of another. And if one joyntenant gives seisure of rent that shall bind the other, but in a *quid juris clamat*, or *quem redditum reddit*, or *per quæ servitia*, one joyntenant shall not be permitted to attorn without his companion, for doing of prejudice to his companion. By *Popham*, one joyntenant may prejudice another in the personalty, but not in the realty; if one take all the profits, or release a personal action, the other hath no remedy, because of the privity and trust between them, and the folly imputed to him, to joyn with such a companion.

Note, if a tenant have notice of the grant by a stranger, and doe give his assent thereunto, it is a good attournement, although it be in the absence of the grantee, but disagreement ought to be to the party himself, or do attorn for any part, it is good for the whole, for the intent of an attornment is but onely an assent to perfect the grant of another, and he which attorns cannot apportion, divide, or alter the grant.

Lord Cromwells Case, 43 of the Queen, fo. 70.

BLUNT bargained, &c. the mannor of *Allexton*, to which the advowson of A. was appendant, by indenture, to have, as after in the same indenture is mentioned, and B. covenanted to suffer a common recovery, to the use of *Andrews* and his heirs, rendering 42 pounds *per annum*, to B. and his heirs, with a *nomine pænæ*. And further, 'twas covenanted, and

agreed, as well for the assurance of the mannor to A. as of the rent to B. that B. should levy a fine, &c. to A. and his heirs, and A. by the same fine, should render a rent of 42 pounds *per annum*, &c. *Provided alwaies*, that A. by deed, should give the advowson, &c. to B. during his life, and if it did not become void, during his life, one turn to his executors, &c. And further, 'twas covenanted and agreed, that all assurances afterwards to be made, should be to the use of this indenture, &c. after a recovery was had, and after B. and A. levye a fine to *Perkins*, and he renders a rent of 42 pounds to B. and the mannor with the advowson to A. A. dyes without granting the advowson, and B. did not request it, B. enters for condition broken, & by indenture inrolled, bargained, &c. to the Lord *Cromwells*, by which he entered, and upon the re-entry of the sonne and heir of A. brought an assize.

In this case is shewed when this word (proviso) or (provided) maketh a condition, and when not, which upon long debate was adjudged by all the justices of *England*.

It was adjudged that the law hath not appointed any place in a deed or instrument, proper or particular to a condition, but in what place it pleaseth the parties, and this word (proviso or provided) is as apt a word to make an estate conditionall, as *sub conditione*, or any other word of condition, but notwithstanding when this word proviso maketh an estate or interest conditionall, three things are to be observed.

First, that the proviso do not depend upon another sentence, nor participate thereof, but stand originally of it self.

Secondly, that the proviso be the word of the bargainor, feoffor, donor, lessor, &c.

Thirdly, that it be compulsory to enforce the bargainee, feoffee, donee, lessee, &c. to do an act, and where these concur it was resolved, that it was a condition in what place soever it be placed, for *cujus est dare ejus est disponere*. And although words of covenant be contained in the same clause of the proviso it self, yet (the proviso being in judgement of law a word of condition) it shall not lose his force, and so it hath been judg'd in *Symson et Titterel*, 26 E. Serjeant *Bendlowes* demised to *Titterel* certain lands in *Essex*, for forty years, provided alwaies, and it is covenanted and agreed between the said parties, that the lessee, &c. should not alien, and this was adjudg'd a condition by force of the proviso, and a covenant also by force of the other words. Also it was adjudg'd in *banco regis*, 36 El. between the Earl of *Pembroke*, plaintiff, and sir *Henry Barkely*, defendant. The earl granted the office of the lieutenantship of the west part of the forrest of *Fronslewood*, in Com. *Somerset*, to Sir *Mawrice*

Barkely, father of the said sir *Henry* in tail ; provided awayes, and the said sir *Mawrice Barkely* for him, &c. doth covenant to and with the said earl, that neither he the said earl, nor any of his heirs males, &c. shall cut down any wood growing upon any part of the premises. And it was resolved by all the justices of *England*, upon argument before them at *Serjeant-Inne*, that although the proviso was coupled with the express covenant of the grantee, and every condition ought to be created by the words of the grantor, donor, feoffor, &c. yet in judgement of law, this word (provided) was a condition created by the grantor, although all the residue of the sentence be the words of the grantee, for (proviso) being an apt word of a condition, the same sentence containeth the words of the grantor, purporting a condition, and the words of the grantee comprehending a covenant.

This word, (proviso,) when it dependeth upon another sentence, or hath reference to another part of the deed, doth not make a condition, but a qualification or limitation of the sentence or part of the deed, to which it is referred. As in a lease without impeachment of waste, provided that he shall not do voluntary waste, grant of a rent charge, provided that the grantee shall not charge the grantor, &c. Resolved, that B. have the rent, notwithstanding that before the *reddendum*, the use in fee was vested by the recovery in A. and notwithstanding 'twas objected, that the rent ought to be limited out of the estate of the recoverors, for 27 H. 8. hath an express clause. Where divers be seised, to the intent that one shall have an annual rent, the same person be adjudged in possession & seisin of the same rent, as if a sufficient grant had been made, and so here the intent being that B. should have the rent, construction shall be made, *ut res magis valeat quam pereat*. Resolved, that the fine levied by B. and A. to P. hath not extinct the condition; (and this was the great doubt of the case ;) 1. Because by the general covenant 'tis declared that all assurances afterwards to be made, should be to the uses and intents in the same indenture, and to no other; and the indenture intends that the condition should be saved as the lord releases all his right in the land, saving his rent. *Putnams Case*, 4, 5 P. and M. *Dyer*: feoffment of a manor rendering rent, and a re-entry, and a covenant, by any indenture to levye a fine, which should be to the uses and intents of the first indenture, and to no other use, which was levied according, with the usual words of release of all his right, yet resolved, that neither the rent nor the condition was destroyed, and 23 of the queen, *Tussers case*, a rent reserved by fine before, was not destroyed by a common re-

covery and general entry into warranty, and 34 of the queen in *Clever* and *Childs* case, adjudged according to *Putnams* case: for the same reason 'twas adjudged in this case, 14 of the queen, for the advowson of *Allextun*, for *modus & conventio vincunt legem*, and covenant and agreements of the parties hath power, First, to raise a use. Secondly, to declare uses upon fines, recoveries, &c. Thirdly, for to preserve rents and conditions, and for to direct recoveries, fines, &c. and the saving may be contained in another deed, delivered at the same time. And these common assurances, as fines and recoveries, are to be construed according to the intent and common usage, without prying into them with eagles eyes. Also, here the bargain, &c. recovery, &c. fine, &c. though made at severall times, yet all by mutuall agreement, are but one assurance, and tend for to perfect a bargain, &c. and therefore the one shall not destroy the other, resolved, that except in special cases, a fine *sur grant & render*, cannot be averred by word to another use, then is, in the fine, feoffment, &c. yet in some cases, it may be ruled in part by averment, by word when the originall contract is by deed; but a man may by word aver another consideration, which stands with the consideration expressed, but not against it: read the book at large for this purpose.

Resolved, that by the death of A. the condition was broken, for when the feoffee or grantee is to do an act to the feoffor, &c. upon condition, and no time is limited, regularly, the feoffee may do it at any time during his life. If the feoffor or grantor do not hasten the same by request, and upon request and day or time limited, the feoffee or grantee ought to do it accordingly: and if no request be made, and the feoffee or grantee that ought to perform the condition dye, the condition is broken. Yet this generall rule admits an exception, for, here in case of an advowson, he hath not time during his life, though no request be made, but upon contingency, to wit, if no avoydance fall in the mean time, for if the grantee stay till the avoydance fall *ipso facto*, the condition is broken, for B. cannot have all the presentations during his life, which was the effect of the grant, and the advowson is come into another plight than twas. But where the day is certain for the performance, and the party dye before, the condition is discharged, because the performance is become impossible by the act of God, and therefore when a day certain is appointed, tis good that the heir of the feoffee be named in the condition. Another diversity was also agreed, when tis to be performed to a stranger he ought to request the stranger in convenient time for to limit a time when it shall be done, but if it be to the feoffor himself, he

ought not to perform it before request. Another diversity was taken by some, when the feoffee dies, and when the feoffor dies, for in the one case the condition is broken, in the other not.

Binghams Case, 43 of the Queen, fo. 91.

R. BINGHAM the grandfather held the mannor of *B. M.* of *Sir Jo. Horseley*, as of his mannor of *H.* and levied a fine to the use of him and his wife for life, and after of *R.* the father, his sonne and heir, in tayl, and after to the right heirs of the grandfather, *R.* the father dyed, the remainder in tayl descended to *R.* his son within age. *Sir I. H.* suffered a recovery of the mannor of *H.* to the use of himself and his wife, in tayl, and after to *Sir R. H.* his son and heir in tayl, after to the heirs of *Sir I.* *Sir I.* and his wife dyed without issue, *Sir R.* enters, *R. B.* the grandfather, dyes, by which the reversion in fee descended to *R. B.* the wife of *Robert* dies, *R.* within age enters and leases, &c. Resolved, that the use limited to the right heirs of the grandfather upon the fine, is a reversion in the grandfather, expectant upon the tayl, not a remainder, so 'twas resolved in *Fenwick & Mitfords* case, and so 'twas resolved in the *Earl of Bedfords Case*. Resolved, that *Sir R. H.* shall not have the ward of the land, for the reversion in fee is holden of him, and not the tail, though both descend from the same ancestor, for the tayl cannot be drowned; and if tenant in tayl grant over the reversion, he shall hold the tayl of his grantee, and though the seigniorie of the tayl be suspended, yet the donee hath two distinct estates, and the reversion is as a mesne betwixt the donee and the lord, and the lord is not defeated; for the law gives no wardship in such cases, and if it were admitted, that by the unity of tenure betwixt the donee & reversion, 'twas determined, yet nothing shall be holden of the lord, but the reversion, and in some cases, the donee in tail shall hold of no body, as a gift in tayl, the remainder to the king. Resolved, if the grandfather were tenant for life, the remainder to the father in tayl, the remainder to the father in fee, the father dies, his heir within age, and *Sir I. H.* grants the seigniorie to *Sir R. H.* and the grandfather dies, that *Sir R. H.* shall not have the ward of the heir, because *R.* the father did not hold of him, nor any of his ancestors, the day of his death, nor the tail was not within the fee and seigniorie of *Sir R.* or any of his ancestors, at the death of *R.* the father; and the writ saith, *præcipe, &c. eo quod terram illam de eo tenuit, die quo obiit*. And though that during the life of tenant for life, the heir of the

remainder shall not be in ward, because tenant for life is tenant to the lord, yet the death of tenant for life is not the cause of ward, but the removing of an impediment, as in *Paget* and *Caries* case, tenant for life commits waste, and after tenant for life in remainder dies, he in remainder in fee shall have waste. Twas said, when two accidents are required to the consummation of a thing, and the one happens in the time of one, and the other in the time of another, neither the one nor the other shall have benefit by it; as the tenant ceases for a year, the lord grants his signiory, and then the tenant ceases for another year, neither shall have a *cessavit*, which was agreed. So *Lacies Case*, *Trin.* 25 of the queen, who gave a mortal wound upon the sea, of which the party dyed upon the land, yet he was discharged, because the stroak was upon the sea, the death upon the land, so that neither the admiral, nor a jury, can inquire of it: and 'twas said, when diverse accidents are required to the consummation of a thing, the law more respects the original cause than any other. A man presents to a church in time of warr, notwithstanding the party be instituted and inducted, *tempore pacis* all is void. So the law more respects the death of him in the remainder, the original cause of wardship, than the death of tenant for life, which is but *causa sine qua non*, and rather a removing of an impediment than a cause; so 'twas resolv'd that neither the one nor the other shall have the ward. Resolved, that Sir *Ra.* should not have the third part of the land, by 32 & 34 H. 8. for though R. the grandfather had limitted the use to the father, which is within the statute, yet when R. the father dies, in the life of the grandfather, the statute extends no further, for the heir of the father, who is in by descent, shall be in ward by the common law, not by the statute, and if the statute should extend to the son and heir of him in remainder, by the same reason it should extend to all the heirs of him in remainder, *in infinitum.*

THE THIRD BOOK.

The Marquess of Winchesters Case, 25 of the Queen, fo. 1.

LIONEL NORRIS and *Anne Mills* were seised of the mannor of M. and to the heirs of the body of L. a common recovery is had against L. (without naming *Anne*,) *H. Norris* being in remainder in tail, is executed for treason, and 'tis enacted that he shall forfeit mannors, &c. uses, possessions, offices, rights, conditions, and all other hereditaments, L. dyed without issue, *Anne* dyed, the queen brought error against the *Marquess of Winchester*, heir of the survivor of the recoverors; the error was, that the original writ of entry wants, the defendant pleaded, that 14 of the queen, she gave and restored to the Lord *Norris*, sonne and heir of *H. Norris*, the mannor *ex speciali gratia*, &c. and all her right, estate, title, claim, &c. Resolved, that the record was well removed by the writ of error, which was for to remove the recovery of the mannor of M. in *M. cum pertinentiis*, and the recovery was of the mannor of M. *cum pertinentiis*. Resolved, that this writ of error was not given to the king by any of the words of the statute of 28 H. 8. because the terretenant is in by title, and the entry of the person attainted taken away, and such a right, for which the party hath no remedy but by action, is a thing consists in privity, which cannot escheat, nor be forfeited by the common law, and this word (*right*) in the act shall be satisfied with a right of entry, and 'twas observed by the court, that by a writ of attainder, a right of action was never given. *Note*, a diversity betwixt inheritances, and chattels for obligations, statutes, recognisances, &c. are forfeited by attainder or outlawry. By the court, if L. had made a feoffment without warranty, this had been a discontinuance of the moiety, for the joynture was severed. Resolved, that *H. N.* had no right to a moiety of the mannor, for though the recovery were erroneous, (for 'twas agreed 'twas not void,) yet the recovery being in force, the remainder hath no right, for the intended recompence, if tenant in tail suffers an erroneous recovery, and disseise the recoverer and die, his issue shall not be remitted, for the tail is barred as long as the recovery stands in force; and the court agreed, that neither an action without a right, with a descent, shall make a remitter, as in the principal case, nor a right without an action, for a man shall never be remitted, but when an action lies, if the right and possession were in several persons.

Resolved, for the one moiety, the recovery shall be a barr to the tail, and remainder, for, though that as well L. as the vouchee might have abated the writ, because *Anne* was joyntly seised not named, yet, when the vouchees, without demanding any line, enters generally into warrant, and admits the writ good, and L. recovers in value, which shall inture according to his estate, with the remainder over, 'tis barred, for by the recovery against L. the joynture was severed, but for the other moiety, the recovery was not a barre to the tail, or remainder, because for that L. was not a tenant to the *precipe*; but the recovery is by estoppell only. Agreed, that *H. N.* at the time of the attainder, was not intituled to have error, yet 'twas agreed that the remainder upon a tail shall have error, upon a judgment given against tenant in tail, for when *W. 2.* inables the donor for to limit a remainder over upon the tail, all actions which the common law gave to privies in estate, are, by the same act, as incident, given also, as a reversion, or a remainder, shall have error upon a judgment given against tenant for life, though not privy by aid, voucher, or receiver. But agreed, that by the common law, error doth not lye by, &c. during the life of tenant for life, except he were privy to the first record by aid, voucher, or receiver, for remedy whereof *9 R. 2. ca. 3.* was made, which gives an attainr or error, during life, upon which statute the court resolved, 1. That though the statute speaks only of reversions, yet remainders are within the purview; 2. That a reversion expectant upon a tail is out, for the statute enumerates these four estates; life, dower, courtesie, and tenant in tail after possibility, which declares their intentions to exclude reversions upon tails, and this upon great reason, for the tail by possibility may continue for ever, and here L. survived *N. H.* and so his possibility of error destroyed, & no word of the act extends to give a possibility. Resolved, admitting the writ of error had been given to the queen, that by this general grant of the queen, it did not pass; for a common person cannot grant it, and therefore it ought to pass by prerogative, & ought to have precise words: adjudged in *Cromers Case*, 8 of the queen; the queen having a right of disseisee attainted, grants *de speciali gratia*, &c. all lands, &c. The right doth not pass, without special recital, and words. *Owen and Morgans Case*, Trin. 27 of the queen; baron and feme are seised, and to the heirs of the body of the husband, a recovery is had against the baron sole, without naming of the wife, & after the wife died.

Resolved, that though the wife were not party to the writ, nor the coniseance, (for the estate of the husband and wife was by render upon a fine levied by the husband,) and though it does

appear within the same record that she was a stranger, yet the render to her is voidable only. Resolv'd, that this recovery against the husband only shall not bind the remainder, for betwixt husband and wife, there are no moities, and the husband hath no power to sever the joynture, or dispose any part, and he, during the life of the wife, is not seised by force of the tail; and he can by no act execute any part; so the *præcipe* being brought against him only, the recompence cannot enure to the tayl, or remainder, for, to all it cannot, for the wife hath a joint estate in possession, and for moiety it cannot, for there are no moities, and the remainder depends upon the entire estate, and recompence recovered by the husband only, cannot enure to him who hath a remainder depending upon the undivided estate of the husband and wife, and the jointenancy cannot be severed by the judgement against the husband only, and though the husband hath all the inheritance, yet because by no possibility, it can be executed, 'tis all one, as if the husband had a remainder depending upon an estate for life, and then a common recovery shal not bind, because, not tenant to the *præcipe* nor seised by force of the tayl, but took effect by estoppell only. The issue may say, this ancestor was not tenant *tempore brevis*, and though here the husband survived the wife, this is not material, for the law adjudges as 'twas then.

Cuppledikes Case, 44 of the Queen, fo. 5.

C. and his wife were seized, and to the heirs males of the body of the husband, the husband levies a fine to A. B. recovers in a writ of entry against A. who vouches the husband only, (the wife living,) who vouches the common vouchee. Resolved, that this recovery shall bind the remainder, for here was a lawful tenant, to the *præcipe*, & though the husband were only vouched, and not his wife, who had a joint estate with him, yet the husband coming in as vouchee, he came in in privy of the estate tail, and not of another estate, & the recovery in value gives recompence to the tail, which the husband had, & to the remainder. A. tenant in tail, the remainder to B. the remainder to C. the remainder to D. A makes a feoffment, the feoffee suffers a recovery, B. is vouched, & he vouches the common vouchee, A. is not bound, but B. and all the remainders are, for though the remainders are discontinued, and cannot be remitted, till the tail be recontinued, yet in a common recovery, which is the common assurance, he which comes in as vouchee shal be, in judgment of law, in privy of

the estate, which he ever had, though the precedent estate, upon which the estate of the vouchee depends, be discontinued, so here the husband shall be said to be in of the tail, and 'tis the stronger, because the estate of the wife was put to a right, so that the husband came in as sole tenant in tail, and not joyntly with his wife, because, she is not vouchee, & he cannot be in of another estate, because, once he had a tail, but had they had a joynt estate to them and the heirs of their two bodies, he being only vouched, it might be doubted whether the tail should be barred, because the wife had a joynt inheritance with him. 8 of the queen, *Dyer, Kniveton's Case*. A *præcipe* is brought against tenant for life, & the remainder in tail, they vouch over, it shall not bind the tail, for the remainder is not tenant to the *præcipe*, and the land is recovered against the tenant for life only, and recompence shall not go to the remainder, and the remainder was never seised by force of the tail, and so 'twas adjudged in *Leach and Coles Case*, 41 of the queen.

Heydons Case, 26 of the Queen, fo. 7.

THE gardians & canons regular of the late colledge of O. seised of the mannor of O. granted a copy-hold to father and son for their lives, &c. and after they leased it to H. for four-score years, rendring the ancient rent, & after surrendered their college. Resolved, that the lease to H. was voyd (the copy-hold for life continuing) by the statute of 31 H. 8. For copy-hold is an estate for life, and the statute saith (of which any estate or interest for life, &c.) at the making of such grant had continuance: read the book at large, where you have admirable rules for true interpretation of all statutes. Resolved, when a parliament alters the service, tenure, interest of the land, &c. in prejudice of the lord, custom, or tenant, the general words shall not extend to copyholds; as the statute of *W. 2. de donis conditionalibus*, doth not extend to them, for if the statute should alter the estate this should also alter the tenure, for the donee ought to hold of the donor, and to do such services (without special reservation) as his donor did to the lord, and the intent of the act was not to extend to such base estates, which were taken then, but tenants at will, and the statute saith, *voluntas donatoris observetur in carta*, &c. So that which shal be intail'd ought to be such an hereditament which may be given by charter, and great part of the land within the realm being granted by copy, it would be inconvenient, that copy-holds should be intailed, yet neither fine,

nor recovery should barr them, so that the owner cannot (without making a forfeiture, by assent of the lord, and a new grant) dispose of it for payment of debts, advancement of his wife, or younger issues, wherefore the statute does not extend to them, by *Manwood, Ch. Baron*, which the court agreed. But 'twas objected that the custome and the statute co-operating, might make a tail, as if by a custome, a remainder had been limited over, & enjoy'd, & plaints in nature of a *formedon in discender* brought, and the land recovered by it; so neither the custom without the statute nor the statute without the custom can make a tail. And *Littleton* saith, that if a custome hath been, that lands, &c. have been granted, &c. or in tail, &c. & paulo post, that a *formedon en discender* lies of all tenements, which writ was not at common law. *Manwood* answered, if the statute doth not extend to them, without question the custom cannot; for before the statute, all estates of inheritance were fee-simple, and no custom can commence after the statute, for this being made 13 E. 1. is made within time of memory; and *Littleton* is to be intended of a fee simple conditional, for he knew well that no custom could commence after the statute of W. 2. as appears in his book 2 ca. 10. and 34 H. 6. & a *formedon en discender*, in special cases, lay at the common law. And by the court, another act made at the same time, which gives an *elegit*, extends not to copy-holds, for the reason aforesaid; but other stat. made at the same time extend to them, as ca' 3. which gives a *cui in vita & receipte*, and ca' 4. which gives to the particular tenant a *quod ei de forceat*. Resolved, that though 'twas not found that the said rents were the usual rents, accustomed to be reserved within 20 years before, yet, because 'twas found that the accustomed rent was reserved, and a custom goes to all times before, it shall be so intended, without shewing the contrary: and judgement was entered for the queen.

The common law is founded upon the perfection of reason, and not according to any private and sudden conceit or opinion.

Douties Case, 26 Eliz. An information in the exchequer, fo. 9.

THE Duke of N. seised in fee of 5 messuages in St. S. parish in H. in the tenure of W. G. bargains & sels his tenements in the parish of St. A. in H. in the occupation of W. G. and is attainted and executed, Qu. *Elizabeth* grants them to I. F. if concealed, the defendant D. claimeth under that patent, against whom the attorney informeth, &c. And judgement was given for the queen.

1. Resolved, nothing passeth by the bargain and sale, because the first certainty was false, otherwise it is, if the first certainty be true, and the second false, so the bargainees was a disseissee.

2. These lands was not in the Q. by the statute of 33 *H. 8. c. 20.* without *scire facias* or seisure, because the words of the statute, that lands shall be in the K. without office, shall be construed as if an office had been found: and lands of a disseissee attainted, shall not be in the K. by office without *scire facias*, or seisure, also all possessions, &c. are saved by the said act, as if it had not been made.

3. That the Q. having but a right it doth not pass by the grant of the said five messuages: and after, a special office was found, and a *scire facias* brought against the terretenants, and judgement given, and the tenements seised into the Q. hands, and she by new letters granted them to S. and his heirs, who peaceably enjoyed them.

Sir William Harberts Case, 26 & 27 Eliz. In the exchequer, in error, fo. 11.

M. H. acknowledged a recog. of 3000*l.* to the K. and died, a *scire facias* issued against his exec'. & *hæredes terrarum*, &c. The sheriff returned, that he had no executors within his bayliwick, and further, that *scire fecit. W: H. militi, filio et hæredi dicti. M. H.* W. H. maketh default, and judgement is given against him generally, and he bringeth error, but upon his petition to the queen, he was admitted to compound with her.

1. Resolved, at the common law (except in special cases) neither land nor body were lyable to execution in debt or damages recovered, but execution was to be done by *fieri facias*, or *levari facias* of his goods and chattels, and profits growing upon his land, but in debt brought against one, as heir, his land was lyable to execution, because the plaint. had

no other remedy, for the goods belong to the executors, but the body, goods and lands of the K. debtor or accomptant were ever liable to execution, but such *levari facias*, or *feri facias*, ought to have been sued within the year, or otherwise he was chased to his writ of debt, and now by *Westm. 2. c. 45.* he may have a *scire facias*, and by the 18 chapter of that statute, an *elegit* is given of the moiety of the land, which was the first act that subjected land to execution, for debt or recognizance, and by the statute of 13 E. 1. *de Mercatoribus*, 27 E. 3. c. 9. & 23 H. 8. c. 6. In statute merchant & statute staple, all the lands of the conusor at the day of acknowledgment shall be extended, into whose hands soever they shall after come. But in all acts *vi & armis*, where a *capias* lyeth in processe, there after judgement a *capias ad satisfaciend.* lieth, & the K. shall have a *capias pro fine*, & in such cases the law (the preserver of peace) subjecteth the body to imprisonment, and by *Marlebridge*, c. 23. *West. 2. c. 11.* a *capias* was given in an accompt, the proces before being a distress infinite, and by 25 E. 3. c. 17. the same proces given in debt as in account, for before this act the body was not liable to execution for debt as aforesaid.

2. If land of the heir be seised in execution, upon a recognizance of his ancestor, he shall not have contribution against a purchasor of his ancestor, although he come in without consideration, & although the heir be not charged as heir, but partly as terretenant; but one purchasor shall have contribution against another purchasor, and one heir against another heir, because they are in *æquali jure*, & therefore the writ here which issued against the heirs, without naming the purchasor, is good, although he be charged as terretenant: The heir shall have an *audita querela* as well as the conusor himself before execution sued, and a *supersedeas*, but a stranger shall not: If divers acknowledge a recognizance, the charge doth not survive, and the land of one shall not be put in execution, but all their lands equally: so if two are bound to warranty, both, or their heirs, and the survivor and the heir of the other shall be joynly vouched, and the land of both shall be rendred in value. But if baron and feme and the heirs of the feme are bound to warranty, and the feme dye, the land of the baron may be solely taken in execution, because there are no moities between baron and feme: So that when land shall be charged by any lien, the charge ought to be equal, but in a lien personal, otherwise, it is as if two are bound in an obligation, there the charge shall survive: But a purchasor, *bona fide*, before any action brought, shall not be subject to any charge. And three errors were moved in the record.

1. The *scire facias* was *hæredi terrarum, &c.* which is improper, for he is not heir to the land, but to his auncestor.

2. The writ is *scire facias hæredi terrarum, &c.* and the retourn is *scire fecit W. H. militi hæredi prædicti M.* and every retourn must answer the point of the writ.

3. The judgement is general against Sir W. H. where it ought to be special, for otherwise his own land shall be liable, where, by the law, the land only which came to him by his father ought to be charged, & he is charged as terretenant as aforesaid, but these points were resolved by the court.

Nota, the new writ of error, after entry of the first, was not brought *quod coram vobis residet*, because the record is not removed out of the keeping of him who had the custody thereof before.

Borastons Case, 29 of the Queen, fo. 9.

B. devised land for eight years, and after to his executors, to perform his will, till H. his youngest sonne came to the age of 21 years, and when H. comes to 21 years, then that he shall have to him & his heirs. H. died at the age of 9 years. Objected that till H. attains to 21 years the land descends to the heir, and for that he never attained to 21 years, this remains in the heir, and the intent appears by the words that he should not have till he come to 21 years, and this ought to precede the commencement of the remainder, and if land were leased till H. comes to 21 years, (H. then being of 9 years.) 'tis no absolute lease for 12 years, for if H. die before 21, the lease shall be determined, which the court agreed. 'Twas also said that when the particular estate which should support the remainder may determine before the remainder can commence, there the remainder doth not vest presently but depends in contingency.

If one make a lease to A. for life, and after the death of B. the remainder to another in fee, this remainder depends upon contingency, for if A. dye before B. the remainder is void. A lease is made to A. for life, the remainder to B. for life; and if B. die before A. the remainder to C. for life; this is a good remainder upon contingency. If A. survive B. which case is all one with the common case, which is many times agreed on in our books, a lease is made to one for life, the remainder to the right heirs of I. S. this remainder is good upon contingency, (*viz.*) if the lessee for life survive I. S. otherwise not, & by the same reason, if a man have issue a son of 9 years of age, maketh a lease untill the son shall accom-

plish his full age, the remainder to another in fee, as in this case, nothing vesteth in him in remainder presently, *quod fuit concessum per tot. cur. vide Chudleyes Case, Lib. 1.*

Ans. That in wills the intent of the devisor is to be considered; for when the devisor in his life by apt words, by good advice, might have made his will sufficient in law, there, though he makes it in disordered manner, and in barbarous and unapt words, the law will order those words, which want order, according to his intent, as in *Wellock & Hamonds* case, copy-holder in borough english devises to his eldest son, paying 40 shillings within, &c. to every of his other sonnes, &c. surrenders according and dies, the eldest son did not pay within, &c. the youngest enters and adjudged lawfull; and resolved,

First, that he had a fee; for the recompence and consideration, though it be not to the value, makes a fee in construction of a will. Secondly, that though paying in a will makes a condition, yet here 'tis a limitation; otherwise it would descend upon the eldest son who is to take advantage of it, and then it should be at his pleasure for to pay or not, and therefore it shall be, as if he had devised to the eldest *quousq*; he failes in payment. So here the devisor hath computed what profits of his land, during the nonage of his son, will suffice or payment of his debts, &c. and that he did not intend that the term of the executors should end by death of H. for so his debts should remain unsatisfied, & his will unperformed, and therefore the law saith it shall be construed that the executors shall have till H. should have come to 21 years of age, and therefore the executors have a term for 12 years, which the court agreed. And though (*when*) and (*then*) are adverbs of time, yet when they referre to a thing which must of necessity happen, they make no contingency, & tis certain that H. did accomplish, or might have accomplished, the age of 21 years, and here, if the term should be ended by death, the remainder should be void; and the court agreed that in wills, and grants, the remainder ought to vest in possession, *eo instanti* the particular estate ends; but here the term did not end, &c.

Walkers Case, 29 Eliz. in banco regis, fo. 22.

WALKER leases certain lands to *Harries* for years, the lessee assigned all his interest to another, *Walker* brought an action of debt against *Harries*, for rent arrear after the assignment, and if the action be maintainable or not was the question, and upon great deliberation and conference with others, it was adjudged, *per Wray*, Chief Justice, *Sir Tho. Gawdy*, and *tot. cur.* that the action *did lye* & was maintainable, in the argument whercof many things were resolved.

If a man lease a stock of cattle or other goods, rendring a rent at several daies, he shall not have an action of debt untill all the daies be expired.

Likewise, if a man make an obligation or other contract to pay several sums of money at several daies, he shall not have an action of debt until all the days be expired, for these are personall contracts and not reall: but in case of a lease for years, which is a reall contract, the lessor shall have an action of debt after every day.

By the court, debt doth well lie in this case against the lessee; there are three privities. 1. In respect of the estate only. 2. Of contract only. 3. Of estate and contract together. The first between the grantee of the reversion, or lord by escheat, and the lessee, so betwixt the lessor and the assignee of the lessee; the second betwixt the lessor and the lessee, (as here,) for, notwithstanding the assignment, and the privity of estate removed by the act of the lessee himself, the privity of contract remains.

First, because the lessee himself cannot prevent the lessor of his remedy; but when the lessor grants his reversion against his own grant, he shall not have remedy, because the rent is incident to the reversion.

Secondly, the lessee might grant it to a poor man, not able to manure the land, or for malice will suffer it to lye fresh, so the lessor shall be without remedy, if debt should not lye against the first lessee.

Thirdly, there is privity of contract and estate together, as betwixt the lessor and the lessee.

If a tenant in *dower*, or tenant by *curtesie*, assign over their estate, yet the privity of the action remaineth between the heir and them, and he shall have an action of wast against them for wast done, after the assignment, but if the heir grant over his reversion, then the privity of the action is destroyed, and the grantee may not have any action of wast, but only against the assignee, for between them is a privity of

estate, and between the grantee and the tenant in *dower*, &c. is no privity at all.

If a lessor enter for condition broken, or if a lessee surrender to the lessor, yet the lessor may have an action of debt, for arrerages due before the condition broken, or the surrender, and this in respect of the contract between the lessor & the lessee. 36 of the queen, *Ungle and Glovers Case* adjudg'd, the lessee assigns his interest, the lessor bargains, &c. the reversion, the bargainee shall not have debt against the lessee, but agreed, that the lessor himself might.

37 *Eliz. in banco regis. Int. Overton & Siddall.* Two points were resolved. First, if an executor of a lessee for years, assign over his interest, that an action of debt doth not lie against him for rent due after the assignment. If a lessee for years assign over his interest and die, the executor shall not be charged for rent due after his death, for by the death of the lessee, the personal privity of the contract (as to the action of debt) in both these cases were determined; 40 of the queen, *Brome and Hores Case.* A lessee of three acres rendring rent, assigns one to B. the lessor suffers a recovery to the use of C. in fee, who brought debt against the first lessee, adjudged it lies, for the lessee assigned his interest, but for part, for the privity of estate remains because he assigned but part, 41 of the queen, *Marrow and Turpins Case,* in debt against two administrators, upon a lease made to their testator, the defendants plead that before the rent arrear, the one of them had assigned all his interest to I. S. of which the plaintiff had notice, and accepted the rent by the hands of the assignee, due after the assignment, and before that this rent now demanded was due, the plaintiff demurred, and adjudged against him, because the privity of the contract was determined by the death of the lessee, and therefore after the assignment made by the administrator, debt doth not lye for rent due after the assignment. Also it was said, that if a lessee assign over his term, the lessor may charge the lessee or his assignee at his election. And if the lessor accept the rent of the assignee, he hath determined his election, and shall not have an action after against the lessee, for rent due after the assignment, no more than a lord having received the rent of the feoffee, shall avow upon the feoffor afterwards.

Butler and Bakers Case, 33 & 34 of the Queen, fo. 25.

W. B. & his wife seised of the mannor of H. (by an estate made to them during coverture for the joynture of the wife) in tail, holden *in capite*, and W. seised of land in F. both which amount to a third part of all his lands ; and also of the mannor of T. *in capite*, which amounts to two parts ; W. devises T. to his wife, upon condition that she should take no former joynture, and dyed, the wife *in pays* refused H. the question was, whether the will were good for the intire mannor of T. or but for part, by the stat. of 32 & 34 H. 8. Resolved, that at common law if a gift be to a husband and wife in tail, &c. the husband dies, the wife cannot devest the free-hold by any verbal waiver, or disagreement *in pays* ; as if she say before entry, that she will never agree to it, she may enter when she pleases, so, if she saith (reciting her estate) that she assents, &c. to the said estate, yet afterwards she may waive it in a court of record ; but if she enters into the land, and takes the profits, though she saith nothing, 'tis a good agreement in law, for the law more respects acts without words, than words without acts, & a freehold shall not be so easily devested to the intent that the tenant to the *præcipe* should be the better known. But as an act *in pays* may amount to an agreement, so it may amount to a disagreement, but this is always of one & the same thing, if the tenant by deed infeoff the lord, and a stranger, & maketh livery to the lord, if the lord disagree by word, 'tis worth nothing, and if he enters generally, and takes the profits, 'tis an agreement, but if he distrains for his seigniory, tis a disagreement, yet in some cases, a claim by words shall direct the entry to be an agreement to one estate, and a disagreement to another, &c. See the book at large, but a man may devest the property of goods and chattels, or an obligation sealed to him, by disagreement *in pays*.

Resolved, that though the estate was created by way of use, which use, before the statute, might have been waived *in pays*, yet, now the statute hath so incorporated the use and possession of the land, that it cannot be waived *in pays*, more than an estate created by feoffment, &c. yet 'twas here resolved, that the refusal *in pays* to have H. and the entry, and agreement to T. was a good agreement to the one, & disagreement to the other. And this by 27 H. 8. ca' 10. *If any woman hath lands, &c. assured after marriage, &c. after the death of the husband, shee may refuse her joynture, and take her dower, &c.* And upon these words the court agreed that a woman

might refuse her joynture *in pays*, and be in-dowed by consent or writ. The great doubt was, if by his refusall of H. by operation of law, it doth descend immediately to the heir after the death of the devisor, for to satisfie the statute, which saith, *the king shall take for his third part such mannors, &c. as shall descend, &c. immediately after the death of the devisor.*

Resolved, first, upon the reason of the common law, the refusall shall not have such relation that the devise shall be good, for the intire manor of T. for a relation is a fiction of law, to make a nullity of a thing *ab initio*, to one certain intent, which in truth had being, and that *propter necessitatem, ut res magis valeat quam pereat.* 11 E. 3. The law will make a nullity *ab initio*, that the wife shall have dower, but not as to a collateral intent, as if the reversion were granted of the lands which the husband & wife held in tail, and the wife for to have dower disagrees, yet the grant is good, for she may be endowed though the grant stand; and *relatio est fictio juris, & intenta ad unum*: and though relations aid acts in law, as dower, yet twill never aid the acts of the party to avoid them by relation, as a man incoffs an infant, or feme covert, and after gives, &c. or devises the land, or any thing out of it, the infant or husband disagrees, this shall have relation betwixt the parties, that the infant or husband shall not be charged in damages, but shall not make the void devise, &c. good. A lease for life, the remainder to the king, the king grants his remainder, the deed is inrolled, it shall have relation to make this pass *ab initio* to the king, not to make the void patent good. And as relations extend only to the same thing, and the same intent, so, also to the same parties, not for to prejudice a stranger, feoffment of a manor, and a long time after livery the tenants attourn, this shall have relation to make the services pass *ab initio*, or otherwise they could never pass, nor be parcell of the mannor, but not for to charge the tenants for the arrerages in the mean time. So here, the refusal shall relate as to the mannor of H. only, not to T. and to the wife only, but not to prejudice the heir (upon whom part of the mannor of T. descended) to make the devise good for the third part, which was void at the time of the death: for, *omne testamentum morte consummatum est*, and it was at the death, so it shall remain. Resolved, that after the statute of 27 H. 8. and before the statute of 32 H. 8. the mannor of T. was not devisable, & therefore when the devisor hath not pursued the authority, which the act of 32 & 34 H. 8. gives, twas void for part.

The first branch he hath not pursued, which saith, (*that all,*

Et c. having a sole estate in fee simple, in any mannors, Et c. shall have full and free liberty, Et c. to dispose by his last will in writing, as much as of, Et c. as shall amount to the clear yearly value of 2 parts in three to be divided. For he had not the mannor of H. for his wife had it jointly with him. See many excellent cases in the book at large, adjudged upon this word. (*having*) in the statutes, the *initium* of a will ought to be full and perfect, which is the writing, and, therefore, if the deviser command one to write his will, & he devises white Acre to A. and his heirs, and black Acre to B. and his heirs, and dies before the devise to B. is written, yet the devise to A. is good. But if he devises to A. &c. upon condition, and he writes the devise, and the testator dies before the writing of the condition, tis void, for in the one case the devises are several, and the one is perfect, in the other case 'tis maimed, and imperfect, for the intire devise was not fully put in writing, so twas resolved in the case at barr, that neither the commencement nor the end of the will was full or perfect, for at the time of writing of it, and at the death of the deviser, he had no power in respect of the joynt estate in H. to dispose all the mannor of T. which amounts to the value of two parts of all. Also, upon the first branch, he ought to have a sole estate, and here his wife is joyntly seised with him, and she cannot disagree during coverture. The statute gives liberty to him for to devise two parts by will, but this is to be intended of such land, which he might convey by act executed, but here by reason of the undivided estate of the wife, he cannot dispose it but during coverture. Also, the third part of *cleer yearly value* is saved to the king, and the intent of the statute was, that the king shall have the equal benefit at least for his third part, as the devisee hath for two parts, but here the devisee had two parts absolutely, & the king but a possibility, viz. if the wife would disagree, which is at her pleasure, and this statute hath been constru'd, that equality should be observed. A man which held three manors of three lords, could not devise two of them, but two parts of every one, upon these words (*cleer yearly value*) 'twas said that of inheritances, which are not of any yearly value, some are devisable, some not, as *bona & catalla felonum, fugiti, or utlagati*. Fines, amerciaments, within such a mannor or town, these cannot be devised, nor left to descend, but a *leet, waif, or stray*, or other hereditament appendent, or appurtenant to a mannor, pass by devise of the mannor with th'appurtenances as incidents, & the statute had no intent for to dismember these things, which by lawfull prescription had been united. But if a hundred, with goods of felons, outlaws,

finer, amerciaments, return of writs, and such other casual hereditaments, within the same hundred, have been accustomedly demised for a yearly rent, they may be devised within the purview of the said act. 'Twas said upon the words of the stat. which says that he may devise a rent, common, &c. *out of two parts*, that a devise of a rent of the full value out of all is void, but out of two parts 'tis good. And 'twas observed, that upon 32 H. 8. a devise of all his land had been good for two parts, as adjudged in *Untons Case*, for land is severable, but a rent is a thing intire, and 34 H. 8. only gives authority for to devise it.

The second branch which speaks of division, cannot be satisfied, for, during his life, he himself could not (*set it out*) and after his death, it survives to the wife. The third and fourth branch is not satisfied in this word (*immediatly*) for till disagreement, without question, the mannor of H. survived to the wife, and if an office had been found before disagreement, without doubt, the queen should have a third part of the mannor of T. and the devise being void at the death of the devisor, and the third part lawfully vested in the heir by descent, it cannot be made good and divested by a subsequent disagreement. *Littleton*, descent to the heir of tenant by the courtesie of a disseissoresse, doth not take away entry, for the heir comes not in immediatly, and 'twas agreed if a man devises two acres holden by knights service, and a reversion upon a lease for life descends to the heir, this is no immediate descent within the statute, but the third part of the two ought to descend; see many excellent cases of devises adjudged upon the statute.

Another good case of relations, *Jennings & Brags Case*, a disseisee makes an indenture purporting a lease for years, and delivers it to a stranger, out of the land, as an escroul, and commands him for to enter, and deliver this as his deed to the lessee, who doth it, and adjudged a good lease, and this diversity agreed.

First, when the person at the first delivery hath not ability to make the contract, and before the second delivery hath, 'tis void, as an infant, and a feme covert; otherwise, when at first delivery, the person hath ability, but cannot perfect it till an impediment removed, which is done before the second delivery, there 'tis good as at bar.

Resolved, secondly, that to some intent the second delivery shall have relation to the former, by fiction of law, *ut res magis valeat quam pereat*, as if a feme sole deliver a lease as an escroul, and after takes husband or dyes, yet by the second delivery 'tis a good deed *ab initio*; and to some intent, *ut res*

magis valeat, &c. it shall not relate, yet in truth, the second delivery hath all its force by the first, and is but an execution and consummation of the former, as at barre, for if it should relate to the first delivery, then it would avoid the lease, for it should be made by one who was out of possession, & *fictio legis inique operatur alicui damnum vel injuriam.*

Thirdly, 'twas resolved that as to collateral acts, that there shall be no relation *omnino*, as if the obligee released before the second delivery, such release is void.

Ratcliffes Case, 34 of the Queen, fo. 37.

A FEME SOLE devises socage land to the sonne of her daughter in tail, the remainder to two sisters of the devisee, and to the heirs of their two bodies, by equal portions to be divided, the remainder in fee to the mother of the daughters, and dies, the sonne dyes without issue; *Martha*, one of the daughters dwelling in her mothers house, (daughter of the devisor,) within the age of 16, and above 14, departed at the second hour in the night, with the consent of the husband of her mother (in whose house she was) 8 miles, and there married E. R.; the issue was, whether E. R. the mother had the custody of the said M. at the time of the contract and marriage aforesaid, for if she had, then the land of M. was lost by the statute of 4 and 5 P. and M. ca. 8.

Resolved, that there were two manners of custodies, or gardianships, the one by the common law, the other by the statute; at common law, four manner of gardians, *viz.* gardian in chivalry, socage, nature, by nurture. The first two are fully described in our books; but great controversie was at barre, for gardian by nature: some held, that the father only shall have the custody of his sonne and heir apparent, within age, not the mother, grandfather, &c. also, that the father shall not have the custody of his daughter and heir, for it ought to be such an heir as shall continue sole and apparent heir; as the father shal not have the custody of the youngest son, in borough english, for tenure in chivalry. Others affirm, that not only the father, but every ancestor, male or female, shall have the custody of his heir apparent, male or female. *Trespas quare l. consanguineum & hæredem* of the plaintiff, *cujus maritagium ad ipsum pertinet, &c. rapuit, &c.* lies. The mother (though she had no land) brought ravishment outward of J. her sonne and heir, against the grandfather, who had land that might descend. By the court, both erre, for 'tis true that every auncestor shall have trespas or ravishment of ward

against a stranger, for his heir male or female, and the writ shall say, *cujus maritagium ad ipsum pertinet*, and good reason, for the establishment of his house consists upon providing of a convenient marriage for his heir apparent, & and it matters not of what age such heir is, but such action lies not against guardian in chivalry, by any of his ancestors but the father. So the court resolv'd here, the mother could not be guardian in socage, if the land had descended to the daughter, nor by nurture, because she was above 14, but the common law gives remedy against a stranger as aforesaid. Resolved here, the mother shall have the custody within the provision of the act which hath ordained two new manners of custodies. 1. By reason of nature. 2. By assignation; the first, the father; after his death the mother; the second, by assignation of the father, by his will, or any act in his life. See the book at large for the exposition of this statute.

Resolved, that the assent of the husband was not material, for the statute hath annexed the custody to the person of the mother, *jure natura*, which is inseparable, and by marriage cannot be transferred to the husband, the father shall not forfeit the wardship by outlawry, nor shall his executors have it,

Resolved, though she departed out of the house six hours before the contract, yet, in judgement of law, the mother had the custody at the time of the contract; for, 'tis inseparably annexed to the person of the mother.

Resolved, that by this devise, the two daughters were tenants in common in tail, by these words, (*equally to be divided*), though they never make partition *in facto*, and so it hath been often adjudged.

Resolved, that the husband and wife damsell, had good title upon this verdict, against the other daughter; for, by these words (*to the next of kin to whom the inheritance should, &c. come after her decease during the life of such person, who shall so contract, &c.*) it seems the daughter shall not have the forfeiture, for though she be of the blood, yet if M. die, her issue shall have the land, if without issue, the mother in the remainder.

To the objection that the mother cannot have it, for she is not of the blood of the daughter, but *è contra*. Father or mother, are not next to whom administration shall be granted; and land shall escheat rather than it shall go to father or mother.

Resolved often, against 5 E. 6. that the father or mother are next to whom administration may be granted, and *Littleton* says that the father is nearer of blood than the uncle, and therefore the father shall have a remainder limited to the next

of blood of the son, but he shall not have an inheritance by descent from the son, for a *maxim* prohibits it. And 'twas said at barre, if he in reversion had been brother of the half blood, he might have entered, as *proximus de sanguine*, yet none of the half blood could inherit. See the book at large, where is excellent learning of descents; as also the learning of *possessio fratris*, &c. Resolved by the court, that it doth not come in question who shall enter for the forfeiture by the statute, for the issue was joyned upon a collateral point, whether the mother had the custody at the time of the contract; and the finding of the jury is not material, and, therefore, though the plaintiff (who was lessee of the husband of the damsel, as appeared) had good title against the defendant, being lessee of the husband of the other sister, yet, because the issue was found against him, judgment was given *quod nihil capiat*, &c.

Boytons Case, 34 & 35 Eliz. in banco regis, fo. 43.

A WRIT of *cap. ad satisfaciendum* is returnable at *Westminster, die lune prox. post Crast. Animaru*, the party is arrested, the sheriff is not bound to bring the prisoner in *recta linea*, from the place where he was arrested, or from the county. But if he have the prisoner in court at the day of the return, (being never out of his custody in the mean season,) it is good: but if a sheriff or a bayliff assent that one who is in execution, and under their custody, to go out of the gaol for a time, and then to return, yet, although he return at the time, it is an escape. And so it is likewise if a sheriff suffer him to go with a bayliff, or a keeper, for the sheriff ought to have him in *arcta custodia*, and the statute of *Westminster* 2. cap. 11. says, *quod carceri mancipentur in ferris*. So as the sheriff may keep him in yron and fetters, to the intent that they may sooner satisfie their creditors. The sheriff, upon a *habeas corpus* for one in execution, may bring the party what way he will, so as he have his body at the day, according to the writ; if one in execution escape out of the gaol, and fly into another county, the sheriff upon fresh sute, taketh him again before any action brought against the sheriff, the judges have adjudged this no escape, and if one in execution escape *de son tort*, and be taken again, he shall never have an *audita querela*, because a man shall not take advantage of his own wrong.

Sir George Brownes Case, 36 of the Queen, fo. 50.

ISSUE in special tail, the remainder to himself in fee; in the life of his mother, tenant in special tail levies a fine (in truth, with *proclamations*, though they were not found) to Sir G. B. the mother (living the sonne) leased for three lives, which was not warranted by 32 H. 8. upon which Sir G. B. entered.

Resolved, that the lease for three lives, though without warranty, was within 11 H. 7. which saith, (*discontinue, alien, release, or confirm with warranty*) for, the intent of the statute was, to prohibit not only every barr, but every manner of discontinuance which puts the heir to his reall action; and because a release, or confirmation, is no discontinuance without warranty, the warranty referres to them, to make them equivalent to an estate which passeth by livery. Note, the title of the act (*discontinuance of right, or estate*) also in the act 'tis said, *if no such discontinuance, warrant nor recovery had been;* so that discontinuance stands in equall degree with warranty.

Resolved, that if the issue had granted his remainder in fee only, and not barred his tail, he might have entered by the words of the act, for the forfeiture, which saith, *every person to whom the interest, &c. title or inheritance, after the decease of the woman should appertain, may enter and enjoy, &c.* as if no such discontinuance had been made, and if no such had been, the land should descend to the issue.

Resolved, that in this case Sir G. B. shall enter, for if no discontinuance had been, he should enjoy it against *Anthony* the issue, and all the heirs of his body, though the fine be levied in the life of the auncestor, for 32 H. 8. sayes, *in any wise intailed to the person so levying the fine, or to any of his auncestors;* and though it work, part by conveyance, part by conclusion, yet, the tail being extinct by the fine, Sir G. B. in remainder shall enter. The same law in this case, though the fine were without proclamations, for the issue against his fine cannot enter; but the entry of the conusee is lawfull.

Anderson said, where 'twas invented (to make an evasion out of this act) that a woman should accept a fine *come ceo, &c.* and render for a thousand years, pretending this not within the words (*discontinue, alien, release with warranty, &c.*) that this was an alienation within the intent of the act, or otherwise the statute should serve for nothing, and so it hath been resolved.

Rigewaies Case, 36 Eliz. in banco regis, fo. 52.

IT was resolved *per tot. cur.* although the prisoner in execution escape out of view, yet if fresh sute be made, and he be taken again in *recenti insecutione*, he shall be in execution, otherwise at the turning of a corner, or by entring into a house, or other means, the prisoner may be out of view; and although he fly into another county, yet because the escape was of his own wrong, whereof he may not take advantage, the sheriff, upon fresh sute, may take him there, and he shall be in execution. But if the plaintiff bring his action against the sheriff upon the escape, before that the sheriff take him, or if the sheriff doe not make fresh sute, yet in both these cases the sheriff may take him and keep him in his custody, untill he make agreement with him, or he may have an action of the case for his wrongful escape. And although the defendant be taken upon a *cap. ad satisfaciendum*, and escape, yet if the writ be not returned and filed, the plaintiff may have a new *cap. ad satisfaciend.* against him, and take him again, and he shall not take advantage of his own wrong. But if the plaintiff will, he may charge the sheriff with the escape, if he did not take him again in fresh sute before the action brought, and when the prisoner escapes of his own wrong, and be taken again, he shall never have an *audita querela* against the sheriff. But it is otherwise if he escape with the consent of the gaoler, then he may not take him again, and if he doe, then he may have an *audita querela*.

Resolved, that the barre was insufficient, for the plaintiff counted of an escape in *London*, and the defendant justifies the retaking in *Devonshire*, so that the escape at *London* was not answered, but the plaintiff not denying the fresh sute, but by protestation relying upon this, that he was out of view, 'twas adjudged against him, but if he had demurred upon the barre, he should have had judgement.

Resolved, that after demurrer, there shall not be a repleader, for the parties by mutual consent have put themselves upon the judgement of the court, and therefore without their consent, they cannot plead, and so several times adjudged.

Lincoln Colledge Case, 37 & 38 of the Queen, fo. 58.

HUSBAND seised to him and to his wife for life, and to the heirs of the body of the husband, dyed, the issue, in the life of the wife, then tenant of the freehold, (for so the pleading was,) which shall be intended by disseisin, for no surrender or forfeiture was alledged, 4 H. 8. suffered a recovery, with single voucher, by agreement that the recoverors should infeoff L. &c. to diversuses, and that the wife should release to them with warranty, which was done according. 11 H. 8. the wife dyed, after the issue dyed; after his issue in the third degree entered; the question was, whether the collateral warranty should binde; the recovery did not come in question, for by the pleading it shall be intended that he was seised by other title than by the tail, so the single voucher not material.

Resolved, that though the first branch of the statute of 11 H. 7. says that the warranty shall be void, yet the clause following (*and that it shall be lawful, &c. to enter*) being annexed to the first, expounds the generality of it, and though he to whom the interest, &c. after the death of the wife appertains, may avoid it by entry, yet 'tis in force against all others; and so the judges have expounded other statutes. 8 H. 6. All outlawries shall be void, except a *capias* be awarded against the party in the county, where, &c. yet this ought to be avoyded by error. The statute of 1 of the queen ordains that all grants, &c. by a bishop, in other manner then, &c. shall be utterly voyd, but 32 and 33 of the queen, betwixt Sale and the Bishop of C. and L. a grant of a next avoidance of a church (not warranted, &c.) was not voydable against the bishop himself, but only against his successors. And with this resolution agrees 27 H. 8. upon the same statute of 11 H. 7.

Resolved, that this warranty was out of the intent of the act, which onely restrains warranty, which prejudices the heir in tail, or those in remainder, but when the warranty, &c. of the wife is but to perfect and corroborate the estate assured by the issue himself, &c. 'tis not restrained by the act, for it shall be intended to the benefit of the heir, which is the reason that a common recovery is not restrained by W. 2. for the intended recompence; and if the wife and the issue had joined in a fine, this had barred the tail; so, if the wife had surrendred, the issue might have suffered a recovery. H. 39. of the queen, the case was, that the younger son tenant in tail by devise, was vouched in a recovery suffered, by a woman

tenant for life, by the same devise, and this was to the use of the vouchee and his heirs, who dyed: and 'twas adjudged that the sister of the vouchee by the intire blood shall have it, not the elder brother, & that the recovery was not within 14 of the queen, though suffered by tenant for life; and the statute says that it shall be utterly void; for 'twas not the intent that the act should extend to a recovery in which he in remainder in tail was vouched, who had an estate that might continue for ever, and had the power to dock all the remainders: so here this statute doth not extend to this warranty, because, &c.

Resolved, when the first issue disables himself for to take advantage of the forfeiture, and dies, his issue shall never take benefit of it, because, he was not *in rerum natura*, nor had the immediate interest at the time; and this was Sir *George Brownes Case* before, where the issue in tail in the life of his mother, tenant in special tail, levied a fine without proclamations: and here, if error were in the recovery, the warranty barres him of his action, because he himself by his own act hath barred his entry. But here if the wife had released, &c. after the death of the issue, his issue might have avoyded the warranty.

Note, (reader) it seems to me, if in such case a woman levies a fine, or suffers a recovery, though the daughter enters, or not, and though she joyns in the fine, or is vouched in the recovery, or by any other act disables her self, yet the sonne born after shall take advantage of it; for entry upon this act of 11 H. 7. is not like entry upon the statute of 6 R. 2. *ca*. 6. For there the daughter by express words hath it as a perquisite, but upon 11 H. 7. *per formam doni*.

Resolved, if tenant in tail, in of another estate, suffer a common recovery, and a collateral ancestor releases with warranty to the recoveror, after the recoveror makes a feoffment to uses, which are executed by the statute of 27 H. 8. and the ancestor dyes, though the estate be transferred in the *post*, before the discent of the warranty, yet it shall bind, and the terre-tenant shall rebutt. See excellent learning upon this point, where an estate transferred in the *post*, before descent of the warranty, shall bind, where not, and where there shall be rebutter in such case, where not.

Pennants Case, 38 of the Queen, fo. 64.

LEASE for yeares upon condition that the lessee shall not assign, &c. without assent of the lessor, he assigns, &c. the lessor, not having notice of the assignment, accepts the rent due after, and enters; it was adjudged for the lessor his entry lawfull; for that the condition being collaterall, the breach wherof may be so secretly contrived that it is not possible for the lessor to have notice thereof, & notice in this case is materiall, and issuable; for otherwise the lessee might take advantage of his own fraud. But if a man make a lease for years, rendring rent upon condition if the rent be not paid to re-enter; in this case if the lessor demand the rent, and the same is not paid, if after he accept the rent (before the re-entry made) due at another day, he hath dispensed with the condition, for there the condition is annexed to the rent, and he (having made demand of the rent) well knew the condition was broken; but although in this case that he accept the rent, due at that day, for which he made the demand, yet he may re-enter, for as well before as after his re-entry he may have an action of debt for the rent upon the contract between the lessor and the lessee.

If the lessor distrain for the rent for which the demand was made, he hath affirmed the lease; for after the determination of the lease, he may not distrain for rent.

It was also resolved, that as well in case of the condition annexed to the rent, as in case of a condition annexed to any collaterall act, if the conclusion of the condition be, that then the lease for years shall be void, there no acceptance of the rent due at any day after the breach of the condition will make the void lease good.

Resolved, that as a voidable lease cannot be affirmed by word, for money, &c. so the acceptance of a rent which is not *in esse*, nor due to him which accepts it, doth not affirm the lease as a gift to a husband and wife, and to the heirs of the body of the husband, the husband dies, the issue accepts the rent of the lessee of the husband, during the life of the wife, the wife dies, yet the issue shall avoid the lease, for no rent was due.

And there is a diversity between a lease for life and for years, in case of a lease for life, though the conclusion of the condition be, that it shall be void, yet acceptance of a rent due before the breach shall affirm it, for the free-hold, being created by livery, cannot be determined before entry. If the successor accept the rent upon a lease for years of a parson,

vicar, prebend, 'tis worth nothing, for 'tis void by death; otherwise of a lease for life. But if the successor of a bishop, abbot, or prior, accept the rent upon a lease for years, he shall never avoid it, for 'twas voidable only.

Note, (reader,) it seems to me, if upon a lease for life, the lessor accepts the same rent which was demanded, he hath affirmed the lease, for he cannot accept it as due upon any contract, as upon a lease for years, for when he accepts it he cannot have an action of debt for it, but his remedy was by assize, if he had seisin, or by distresse, but after re-entry he may have an action of debt.

If he that hath a rent service, or rent charge, accepts the rent due at the last day, and therefore makes an acquittance, all the arrerages due before, are thereby discharged, and so it hath been adjudged in *Hopkins and Mortons Case*, 10 *El. Dyer*.

A man is not bound to pay an annuity without an acquittance, but a rent service, or rent-charge, he is.

If the lord accepts the rent or service of the feoffee, he loses the arrerages in the time of the feoffor, though he makes no acquittance, for, after such acceptance, he shall not avow upon the feoffor at all, nor upon the feoffee, but for the arrerages which incurred in his time; otherwise, where the feoffor dies, and there is such an acceptance. But acceptance of rent or service by the hands of the feoffee, shall not barre the lord of relief due after, for that is no service; if it were, debt would not lye for it.

'Twas said, if the lord accepts services by the hands of the heir, infeoffed within age by collusion, he loses the wardship. But against this 'twas objected, First, because the lord upon tender of the arrerages, and notice, is compellable to avow upon him. Secondly, he cannot be concluded before title accrued. Answered, the lord is not compellable, &c. for he may shew the collusion, and avow upon the feoffor, and by acceptance, the lord waives the benefit of the statute, purges the collusion, and loses the wardship.

Westbyes Case, 39 & 40 Eliz. in banco regis, fo. 71.

WESTBY brought an action of debt against *Skinner & Catcher*, sheriffs of *London*, for an escape. One *Buston* was in execution, and in their custody, at the sute of one *Dighton*, and at the plaintiffs sute, and at the end of their year, the sheriffs deliver'd the body of *Buston* (amongst others) unto the new sheriffs by indenture, wherein the execution at the sute of *Dighton* was mentioned, but the execution at the sute of *Westby* was omitted, and *Buston* still continued in the gaol, and if the defendants should be charged in this case with the escape, was the question? And it was adjudged that they should be charg'd, for although he was within the walls of the prison, yet that was an escape in law, as to the plaintiff. And it was resolved, that *eo instanti*, that the ancient sheriffs delivered their prisoners to the new sheriffs, the escape began as to the plaintiff.

Note, hereby, that the law judgeth one that remains in the gaol to have escaped, and it was resolved, that the ancient sheriffs ought to give notice to the new sheriffs of all executions that they have against any that are in their custody, and it was also resolved, untill the prisoners be delivered to the new sheriffs, they remain in the custody of the old sheriffs, notwithstanding the new letters patents, the writ of discharge, and the writ of delivery. And 'twas resolved, that if the old sheriff die before a new one be made, the new sheriff at his own perill ought to take notice of all executions against any of the prisoners; and this is for necessity, and if one in execution break the gaol between the death of the old sheriff and the making of the new, this is no escape; but when the sheriff is dead, all the prisoners are in the custody of the law, untill the new sheriff be made; & although no fresh sute be made after, they may be taken in possession, in what place soever they come in.

*Dean and Chapter of Norwich Case, 40 & 41 of the Queen,
fo. 73.*

H. 8. An. 30. translated the priory and covent of the cathedral church of the holy trinity of *Norwich* into the dean and chapter, &c. and discharged them by their special names, *tam de habitu quam de regula; ipsosq; decanum & capitulum, perpetuis temporibus duraturis incorporavit*, and granted them all the mannors, &c. which of late belonged to the priory; & granted that they should be the dean and chapter of the Bishop of *Norwich*, and his successors, after 2 E. 6. the dean and chapter surrendered to the king their church and possessions, and he incorporated them by the name of the dean and chapter, *sancta & invididua Trinitatis Norw' ex fundatione*, E. 6. and regranted them their church and possessions, by the name of the dean, &c. omitting *ex fundatione regis*, E. 6.

Objected, that *Herbert* heretofore Bish: of *Norwich*, was founder, and being not party to the translation, 'tis voyd.

Answered, the king was founder, as appears by many records, and by the foundation; but, admit the bishop founder, yet the translation was good, for the pope might have discharged a monk of his profession, and therefore the king may do it by the statute of 25 H. 8. And this translation is no prejudice to the founder, for he remains founder, & nothing is altered but the rule and profession; and this prior was eligible, 11 of the queen. *Dyer. Corbets Case*, proves this very translation good, & by judgment of parliament, 33 H. 8. such translations are good, all chapters were monks, & notwithstanding, their translations into prebends, or cannons, the advowson remains as before. But admit the translation void, yet, 'tis good by the statute of 35 of the queen, see the book at large.

Objected, when they surrendered to E. 6. and he regranted to them, by the mis-naming of the corporation, for (*ex fundatione regis E. 6.*) was omitted, the grant was void, and nothing passed, for the name of the founder is parcell of the corporation.

Answered, notwithstanding the surrender of their church, their corporation continues: and they remain the chapter of the bishop; though there cannot be a gardian of chapel, when the chapel and all the possessions are aliened in christian

policy 'twas thought necessary, (for that the church could not be without sects and heresies) that every bishop should be assisted with a counsel, viz. a dean and chapter. 1. To consult with them in deciding of difficult controversies of religion, to which purpose every bishop *habet cathedram*. 2. To consent to every grant the bishop shall make to bind his successors; for the law did not judge it reasonable to repose such confidence in him alone: at first all the possessions were to the bishop, after a certain portion was assign'd to the chapter, therefore the chapter was before they had any possessions, and of common right, the bishop is patron of all the prebends, because their possessions were derived from him, so that so long as the bishoprick continues, the dean and chapter (being his counsel) remains, though they have no possessions, as at first they were, when the bishoprick consisted all of spirituality. The prior & friers carmelites had not any possessions, nor place. And 32 H. 8. Fitz held, if an abbot or prior and covent, sel their possessions, yet their corporation remains. All bishopricks were at the foundation of the Kings of England, & ancient donative by them; but, by grant of the kings, became after eligible by their chapter; wherefore, if by their surrender, their corporation should be dissolved: three inconveniences would follow. First, to the bishop, for his assistance in the episcopal function. Secondly, to the bishop and others, touching the confirmation of grants. Thirdly, to all the church, for how should the bishop be chosen?

Resolved, first, if there were any imperfection in the translation, the statute of 35 of the queen hath made it good.

Secondly, that the act of 1 E. 6. hath made it good, though the corporation were gone by the surrender, and the misnamer materiall.

Holden by the justices and lord keeper, that the ancient corporation remains, notwithstanding the surrender.

Fermors Case, 44 of the Queen, fo. 77.

SMITH lessee for years of a house, and tenant at will of land, and tenant by copy of other land within the manor of S. to *Fermor*, leased all for life to I. S. and also seised of other land there in fee, levied a fine with proclamations of all messuages, and lands (which comprehend all those leases, and also his inheritance) by coven, to dis-inherit his lessor and after the fine, alwaies continues in possession, and pays the severall rents to F. the lessee for life dyes, the years expire, S. claims the inheritance.

Resolved, that the lord of the mannor was not barred by the said fine. 1. The makers of the statute of 4 H. 7. never intended that a fine levied by tenant at will, years or copy, which pretend no inheritance nor title to it, but intend the disherison of the lord, &c. should bar them of their inheritance, and where the stat. saith (*that fines ought to be of greatest strength to avoid strife and debate.*) This feoffment and fine by the lessee shall be the cause of strife where none was before. 2. The statute doth not intend, that those who of themselves without such fraud, could not levy a fine to barre those which had the freehold & inheritance, should be unable to levy a fine by making of an estate to another, by practice and fraud. 3. If doubt be conceived upon an act of parliament, 'tis to be construed by the reason of the common-law, & that so abhors fraud, & covin, that all acts, as well judicial as others, and which of themselves are lawful and just, yet being mixt with fraud and deceit, are tortious and illegal. If a woman intituled to have dower (which is favoured in law) by covin, causes a stranger to disseise the terretenant, to the intent to bring dower against him, and recovered accordingly, 'tis all void. So if a feme covert, or infant (much favoured in law) of covin, causes another to disseise the discontinuee, & infeoff them, they are not remitted. Sale in market overt shal not bind, if the vendee had notice that the property was to another, or if the sale be by covin; the law hath ordained the common bench as a market overt, for assurance of land by fine; for it saith, *finis finem litibus imponit*, yet covin shal avoid them: a *vocat* was made in *banco* of a recovery had by covin, 33 & 34 of the queen adjudged, where tenant for life levied a fine with proclamations, and five years passed, and he died, that the lessor shall have five years after his death, for though the statute saves the right which *first shall grow*, and the right first accrued to the lessor by the forfeiture, yet because the lessor by covin of the lessee might be barred, for he expecteth not to enter, till after the death of the lessee, 'tis no barr, & namely, when the lessee hath land of inheritance in the same town, (as in this case,) so 'twas agreed in the same case, if the feoffee of the lessee for life hath lands in the same town, & levies a fine, &c. the lessor shall have five years after the death of the lessee, for he knew not of what land the fine was levied, (not being party to the indenture or agreement,) &c. So, the judges have construed the act against the letter, for salvation of the inheritance of him in reversion. And 'twas said, if the feoffee of a lessee for years, who made a feoffment by practice, hath land in the same ville, and levy a fine and the lessee pays the rent to the lessor, it shall not bind,

and in the principall case, the payment of the rent after the fine, makes the fraud apparent, for by this the lessor was secure, and not cause of any doubt of fraud.

But 'twas resolved, if the bargainee or feoffee of A. perceiving that C. hath right, levyes a fine, or takes fine of a stranger, to the intent to barre C. this fine levied by consent shall bind, for nothing was done in this that was not lawfull, and the intent of the act was to avoid strife. So, if A. (pretending title) disseise B. and to the intent to barre the disseisee, levies a fine, for the disseisor, *venit tanquam in arena*, & 'tis not possible but the disseisee had knowledge of it, & if he doth not enter, 'tis his folly. But in the case at barre, every one will presume that the fine is levied of his own land, because that he might lawfully do; and though this contains more acres than his own land, this is usuall almost in all fines; and the covin of the lessee is the cause of non-claim of the lessor, and a man shall not take advantage of his own covin; and here the fraud is the more odious, because of the great trust, *viz.* fealty. To the objection, that it should be mischievous to avoid fines, upon such nude averments, 'twas answered, that it should be a greater mischief, principally, if fines levied by such covin should bind. And an averment of fraud may be taken by the statute of 27 of the queen, against a fine levied to secret uses, by fraud, for to deceive purchasers. So by the statute of 13 of the queen, an averment may be taken against a fine levied upon a usurious contract.

Twynes Case, 44 Eliz. in Cam. Stel. fo. 80.

IN an information *per Coke*, attorney general, against *Twyne*, of *Hampshire*, for contriving and publishing of a fraudulent deed made of goods. The case upon the statute 13 *El. c. 5.* was thus: *Pierce* was indebted unto *Twyne* in 400*l.* and to one *C.* in 200*l.* *C.* brought an action of debt against *Pierce*, (and hanging the writ) *Pierce* being possessed of goods and chattels to the value of 300*l.* in secret made a deed of all his goods and chattels to *Twyne*, in satisfaction of his debt, and yet *Pierce* continued in possession of the same, and some of them he sold, and his sheep he marked with his own mark, and after *C.* had judgement, and a *fier. fac.* to the sheriff, & by vertue thereof bayliffs came to make execution of the goods, & divers persons, by the commandement of *Twyne*, with force resisted them, claiming them to be the goods of *Twyne* by vertue of the same deed, & whether this deed was fraudulent or no was the question?

& 'twas resolved by Sir Thomas Egerton, keeper of the great seal of England, and by the Chief Justices, Popham and Anderson, and all the court of star-chamber, that this deed was fraudulent, and within the statute of 13 *El.* And in this case divers things were resolved.

First, that this deed had the marks of fraud, it was generall, and without exception of his apparel, or any thing of necessity: for *dolus versatur in generalibus*.

Secondly, the donor continueth in the possession.

Thirdly, it was made in secret, *et dona clandestina semper sunt suspiciosa*.

Fourthly, it was made hanging the writ.

Fifthly, there was trust between the parties, for the donor was in possession, and used them, and fraud is alwaies appalled with trust, and trust is the cover of fraud.

Sixthly, it was contained in the deed that it was honestly, truly, & *bona fide*, *et clausula inconsuetæ semper indicant suspicionem*, & it was resolved, although it was a due debt to Twyne, and a good consideration of the deed, yet it was not within the proviso of the said act of 13 *Eliz.* by which it is provided that the said act doth not extend to any estate or interest in lands, &c. goods & chattels made upon good consideration, and *bona fide*, for although it be upon good and true consideration, yet it is not *bona fide*, for no deed shal be deemed to be made *bona fide* within the said proviso that is accompanied with any trust, for the proviso saith upon good consideration, & *bona fide*, so as good consideration doth not serve if it be not also *bona fide*.

Therefore, (good reader,) if any deed be made to thee in satisfaction of any debt, by one that is indebted unto others also, first, let it be in publick manner before neighbours. Secondly, valued by good men to a true value. Thirdly, take them out of the possession of the donor presently, for continuance of possession in the donor is a mark of trust.

There are two considerations, *viz.* consideration of blood or nature, and valuable consideration; and if one that is indebted to five several persons, every one 20*l.* in consideration of natural affection, doth give all his goods unto his son or cosen. The intention of the statute was, that the consideration in this case should be valuable, for equity requires that this deed that defeats others, shall be made of as high a consideration as the things are that are so defeated thereby, for it is to be presumed that the father, if he had not been indebted unto others, would not dispossess himself of all his goods, and subject himself to his cradle. And therefore it shall be intended that it was to defeat his creditors. And if a consi-

deration of nature or blood, should be a good consideration within this proviso, the statute would serve for little or nothing, and no creditor should be sure of his debt.

A feoffment made solely in consideration of nature or blood, shall not take away the use raised upon valuable consideration, but it shall take away a use raised in consideration of nature, for both considerations are in *æquali jure*, and of the same nature.

Many men marvell the reason that so many acts and statutes are daily made : this verse answereth.

Quæritur ut crescant tot magna volumina legis.

In promptu causa est crescit in orbe dolus.

And because fraud abounds in these daies more than in former times, it was resolved, that all statutes made against fraud, shall be liberally expounded for to suppress the fraud, and according to this, see severall resolutions in the book at large.

It was resolved, that no purchaser may avoid a precedent conveyance made by fraud, but he that is a purchaser for money or other valuable consideration paid, for consideration of blood is a good consideration, but not such a consideration as is intended by the statute 27 *El.* c. 4. for valuable consideration is only good consideration by the same act. *Anderson*, Chief Justice of the common banck, said, that a man who is of small capacity, and not able to govern his lands that descends unto him, and being disposed to riot & disorder, by the mediation of his friends, by open act conveys his land to them, upon trust and confidence that he shall take the profits for his maintainance, that he shall have no power to wast or consume them, and after, he being seduced by deceitfull and covetous persons bargained for small sums, his lands of great value ; this bargain, although it were for money, was holden to be out of the statute, for this act was made against all fraud and deceit, & shall not aid any purchaser that commeth not to the lands of good considerations lawfully without fraud or deceit. And in this case *Twyne* was convicted of fraud, and he and all the other of ryot.

*Resolutions. P. 44 of the Queen upon the Statutes of
Fines, fo. 84.*

A. tenant for life, the remainder to B. in tail, the remainder to B. and his heirs, B. levies a fine, hath issue, and dies before all the proclamations passed, the issue then beyond the sea, the proclamations are made, the issue returns, and upon the land claims the remainder.

Resolved, that the estate which passed was not determined by the death of tenant in tail; so, if tenant in tail of a rent, advowson, tythes, common, &c. grants by deed and dies; for if the issue brings a *formedon* for the rent, he makes the grant voydable, if he distreyns, or claims it upon the land, he by this determines his election. And there is no diversity betwixt tenant in tail of a rent, &c. and tenant in tail of a reversion, or remainder upon an estate for life, though in the first case, the issue may have a *formedon* presently after the death of tenant in tail.

Holden by *Popham*, and divers other justices, that the statute of 32 H. 8. hath enforced the case, that the estate which passes by the fine of tenant in tail shall not be determined by his death, for by this 'tis provided that fines levied of any lands, &c. intailed, immediatly after the fine ingrossed, and proclamations made, shall be a barre, if the fine cannot be a barr without continuance, the statute hath provided that the estate shall continue, for it provides for all necessary incidents to the perfection & consummation of it. Every fine shall be intended with proclamations, for 'tis most beneficiall for the conusee, & all fines being the generall issue of land are levied according.

Resolved, that though by the death of tenant in tail a right to the estate tail descends to the issue, for that the tenant in tail dyed before all the proclamations passed, yet, when they are passed without claim, this right is barred by the statute of 32 H. 8.

Resolved, by all the judges and barons, (but three,) that the issue (in this case) being heir and privy, cannot, by any claim, save the right of the tail, which is descended to him, but that after the proclamation he shall be barred; for, 'tis provided (*that every fine after the ingrossing of it, and proclamation had and made, shall be a final end, and*

conclude as well privies as strangers.) And if no saving had been, all strangers had been barred also, and all the exceptions extend only to strangers; but the issue is privy.

To the objection, if by the equity of the statutes the issue cannot claim, &c. to what purpose are the proclamations with such solemnities?

Answered, 32 *H.* 8. being an act of explanation of 4 *H.* 7. as to the fine by tenant in tail, shall not be taken by any strained construction against the letter, for then 'tis requisite to have a new act of explanation upon the explanation, & sic in infinitum. By 4 *H.* 2. every one hath liberty to pursue a fine according to the said act, viz. with proclamations, &c. or without, (as at common law,) and therefore the act of 32 *H.* 8. of necessity prescribes that proclamations shall be made according to 4 *H.* 7. to distinguish it from a fine at common law, and not to inable the issue for to make claim, for this should be against the express intent of the act, in the preamble and purview. Also it should be very inconvenient, if, when such fine is levied for a valuable consideration, advancement of his issues, or payments of his debts, and he dies before proclamations, that all should be avoided by the claim of the heir, when the conusee could not have better assurance by recovery, for that he was not tenant to the *præcipe*. See the book at large, in what case the issue in tail may averr seisin in a stranger, & quod partes finis nihil habuerunt, what not.

Objected, 1. 'tis provided by the statute *de donis*, &c. that as to the issue, *finis ipso jure sit nullus*; 2. That the statute of 27 *E.* 1. extends not to the heirs in tail, as 8 *H.* 4. is, for the issue is not bound by any record which inures by way of estoppel; 3. 27 *E.* 1. speaks *de finibus ritè levatis*, and when there wants acisin (which is the essence of a fine) 'tis not *ritè levatus*, 46 *E.* 3. that 'tis a good plea.

Answered, the statute *de donis*, &c. was made 13 *E.* 1. and the statute of fines 27, in which the issue is not excepted, therefore he is bound, and according there is a good opinion 8 *H.* 4.

To the second, though the issue was not barred of his right before 4 *H.* 7. yet he was estopped to say *quod partes finis nihil habuerunt*.

To the third, *finis ritè levatus* is intended in due form

of law, which it may be, though it be only by way of conclusion, for the same act ousts the parties from such averment, and 46 E. 3. is to be intended of a collateral ancestor, from whom the heir doth not claim the land, and when the averment is good.

In *Conisbys Case* 'twas resolved, upon a fine levied to tenant in tail in remainder, by tenant for life, and a grant and render of a rent, that this was not within the statutes of 4 H. 7. or 32 H. 8. for the fine was not of the land it self which was intailed, but of the rent newly created out of the land. And in the *Lord Zouches Case*, 'twas resolved, that 4 H. 7. and 32 H. 8. do extend to fines levied by conclusion, and shall bind, though *partes*, &c. *nihil habuerunt*; as if tenant in tail makes a feoffment, or be disseised, and levies a fine, for the statute says (*all fines of any lands, &c. in any wise intailed to the person so levying, or to any of his ancestors,*) and in 4 H. 7. the exception, *quod partes, &c. is saved to all persons not party nor privy to the said fine*, and the issue in tail is privy, for he claims as heir by descent, and if such fine shall barre where the tenant in tail had nothing, though the issue enter after the death of the ancestor, before all the proclamations pass; *a fortiori* here, when tenant in tail at the time was seised of an estate, though 'twere in reversion; see *Archers Case*, where a fine shall barre the issue, where the father had only a possibility at the time of the fine levied.

Purslowes Case, 32 of the queen, tenant in tail levies a fine, term. P. & T. and died in August next, his daughter (being heir to the tail) & her husband brought a *formedon*, and pending the plea, the proclamations passed, and 'twas agreed by the court that the tenant shall plead the fine and the proclamations which passed pending the writ, and shall bar the demandant, yet there the issue did all that might be done; for the conveyance is the fine, and the proclamations are but a short repetition of the fine; out of this four things are to be observed; 1. Though after the fine, a right descends to the issue, yet, after proclamations, the right is barred; 2. Though he pursues a *formedon*, yet after proclamations he is barred, *ergo*, in the principall case he is barred, notwithstanding his entry or claim *in pays*; 3. When tenant in tail levies a fine, and dies before proclamations, the issue is not within any of the *savings*, for then the bringing of a *formedon* should avoid the bar; 4. The proclamations serve for no pur-

pose but to distinguish the fine from a fine at the common law. *Trin.* 4 of the queen, *Bendlowes*, tenant in tail, disseised the discontinuee, and levied a fine, and took an estate by render, the discontinuee enters, and claims before all the proclamations passed, and avoids the estate, after the proclamations pass, tenant in tail continues his possession, and dies within the year after the entry and claim. Resolved, that the issue was not remitted, but barred by 32 *H.* 1. though the estate was avoyded before all the proclamations passed.

Resolved, though the issue be beyond the sea, yet, because he is privy, &c. he is bound as if he were within age, covert, or *non compos*. Which was agreed by all the justices: *ergo*, the claim of the issue is not material, and if infancy, &c. should avoid the fine, no man should be assured of land conveyed.

THE FOURTH BOOK.

Vernons Case, 14 & 15 of the Queen, fo. 1.

IN dower, the tenant shews that the husband made a feoffment of other land to the use of himself for life, and after to the use of the demandant for life, &c. and avers that the said estate was for her joynture, &c. and that the demandant had entered, &c. and agreed to the estate: the demandant shews that the estate was upon condition for to perform the will of the husband, and that divers things were to be performed in it, judgement if the tenant shall be admitted, &c.

Resolved, that at common law, a right or title to a freehold cannot be barred by acceptance of a collateral satisfaction or recompence; as if a disseisor of the mannor of P. gives to the disseisee the mannor of S. in satisfaction of all his right, &c. And therefore 'tis said in our books, that an accord with satisfaction is a good plea in a personal action, where damages are to be recovered, not in a reall; and therefore no barre in dower, but dower *ad ostium ecclesiæ*, or *ex assensu patris*, concludes her, if she enters after, &c. for the law allows them, &c. to be dowers in law. Before 27, most lands were in use, and because wives were not dowable of the use, estates were made by the feoffees to the husband and his wife, before or after the marriage for life, &c. for a competent provision for the wife; then 27 transferred the possession to the use, and if further provision had not been, the wives should have their dowers and joyntures also: and therefore those branches were made in the same statute of 27.

Resolved, that the feoffment to the use of himself for life, the remainder to his wife for life, for the joynture of the wife, is within 27, for though that five estates only are expressed; 1. To the husband and wife, and the heirs of the husband, &c.; 2. To the heirs of their two bodies; 3. Of the body of one of them; 4. For their lives; 5. To the husband and wife for life of the wife, yet, many other estates are within the act, for these are put for example, not to exclude others: but resolved, that no estate is a joynture, except it takes beginning presently after the death of the husband; for so are all the examples: and therefore to himself for life, the remainder to

B. for life, the remainder to his wife, &c. is not within the statute, &c. and therefore though the wife enter, and takes the profits, she shall have dower. An estate to one and his wife, and the heirs males of their two bodies, adjudged a good jointure, yet none of the five estates mentioned; an estate made to a woman for life, before marriage, adjudged a good jointure.

Resolved, though the estate here were upon condition, and though dower (in place of which the jointure comes) were absolute, yet, because an estate for life upon condition is an estate for life, 'tis within the words, and the intent of the act, if the wife accept it, &c.

Resolved, that a wife cannot waive a jointure made before the coverture, as she may a jointure made after; and this by the *proviso*, (if any woman hath lands, &c. assured after marriage for her life, &c. after death of the husband she hath liberty to refuse, &c.) and therefore the intent of the statute was, that she should not refuse a jointure made before, and land conveyed for part of her jointure, or in satisfaction of part of her dower, is no bar of any part for the uncertainty; for the statute says, for the jointure of the wives, and not for part of the jointure.

Resolved, that though the estate of the wife be upon an expresse condition for to perform the will, which imports a consideration of making the estate, yet it may be averred for jointure, for the one consideration well stands with the other, and though it be not expressed in the deed, yet it may be averred: and the case is the stronger, because the averment is given by the words of the act. And a fee-simple to the wife, in satisfaction of her dower, is a jointure within the equity of 27, for the reasons aforesaid, as also because it is within the expresse words, (*for term of life, or otherwise,*) for all estates as beneficial, or more, are within, by this word *otherwise in jointure*, after judgment was given against the demandant.

And devise to a wife for a life, in tail, &c. for her jointure, is a good jointure within 27, as 'twas resolved in *Leake and Randals Case*. Otherwise, where a man devises to his wife for life, &c. generally this cannot be averred to be for jointure, and therefore no bar of dower; 1. Because a devise imports a consideration in it self, and shall be taken as a benevolence; 2. All the will for land by 32 & 34 H. 8. ought to be in writing, and no averment ought to be taken out of the will, which cannot be

collected by the words within ; an estate before marriage is within the equity of the statute ; so an estate by devise, which takes effect after the marriage dissolved, is within 27.

Beville's Case, 27 & 28 of the Queen, fo. 8.

TENANT by homage, fealty, and escuage, and sute to court twice a year ; the lord was seised of the fealty only by the hands of the tenant. Resolved, that seisin of fealty was a seisin of all the said services ; for when the tenant doth fealty, he takes a corporal oath that he shall be faithfull and true to the lord, and shall bear him faith of the tenements which he claims to hold of him, and that he will lawfully do the customes and services, &c. And though homage be more honourable, and the most humble service, that a freeholder can do to his lord, yet, fealty is the more sacred service, for this is done upon oath, not the other. And the words (*shall be faithful and true*) are also parcel of homage ; and seisin of any part of any service is a seisin of the whole, and the law, for this reason, so respects these services, that no distresse for them shall be excessive, and though distresse be so often that the tenant cannot manure his land, he shall not have an assize, as for rent, or other profits.

Resolved, that seisin of a superior service is a seisin of all inferior services incident to it, as a seisin of escuage, of homage and fealty, homage of fealty, rent of fealty, where the seigniority is by fealty, and rent. Resolved, that doing of homage is a seisin of all services, inferior and superior, because he takes upon himself to do all services. Resolved, that seisin of rent of sute, or of other annual service, is seisin of escuage, homage, fealty, ward relief, heriot service, service for to cover the hall of the chief house of the mannor, for to impale the barke of the lord, or such casual services, which perchance will not fall in sixty years, but seisin of one annual service is not seisin of another annuall service, as rent of sute nor of work daies, for 'tis the folly of the lord that he attained not seisin, and it should be mischievous to the tenant, for perhaps in ancient time the work dayes are discharged, which now cannot be shewn.

Note (reader) all this is to be intended of a seisin in law, for seisin of fealty here is no actual seisin of homage, nor of sute, nor fealty of rent, but seisin of any part of a service is an actuall seisin of all to have an assise. And as to make avowry seisin in law suffices; but as for an assize actuall seisin is requisite; so in a writ of right of land. See the book at large, and there, where ancient seisin to an estate is altered, or changed from one person to another shall be sufficient, where not.

Resolved, that seisin in law was sufficient to make an avowry within the letter, and the intent of the statute of 32 H. 8. for the intent was to limit a time within which seisin ought to be had, not to exclude any seisin which was a lawfull seisin by the common law, which appears by the preamble. Also, the former acts of limitation as *W. 1. ca³ 38. W. 2. ca³ 2.* do not exclude a seisin sufficient at common law. And the statute saith, (*actual possession or seisin*) which (*seisin*) is either actuall or in law.

Resolved, that the act doth not extend to such a rent or service, which by common possibility cannot happen within sixty years, as homage, fealty, for the tenant may live beyond, or to cover the hall, or to go in war, so of a *formedon in descender*, for tenant in tail may live sixty years after discontinuance, and though *in facto* he dyes, and the issue doth not pursue his *formedon*, yet, he may have it at any time, and the seisin of the donee was not traversable, so of homage and other casuall services, though the lord might have had seisin. So, if the lord release to the tenant, so long as I. S. hath heirs of his body, though sixty years passe, yet he may destrain, for *impotentia excusat legem*, and there may be a tenure by homage, &c. and yet never done, as if the land be conveyed to a maior, &c. or other corporation aggregate of many, they hold by fealty, yet they cannot do it. A writ of escheat, *cessavit*, *rescous*, are not within the act, for in them the seisin is not traversable, but the tenure, and in the escheat and *cessavit*, they demand the land and can lay no seisin, and the act extends only to those writs where the demandant or his ancestors might have had seisin. So, *note*, land shall escheat, though there be no seisin of the services within the time of limitation, for the seignory remains, though seisin wants; so if the tenant cess, and the land be not overt, and sufficient to his distress, the lord shall have a *cessavit* though he wants seisin of the services. Resolved,

if nothing be arrear and the lord distrains, the tenant may make rescous, or if he be so often distrained that he cannot manure his land, he may have an assize, *de souent distress*, but for such tortious distress, where nothing is arrear, the tenant shall not have trespass *vi & armis* against the lord, for this is prohibited by the statute of *Marleb. ca' 3*. See the book at large in what case an incroachment of more rent by the lord than he ought to have shall be avoyded, in what not.

Resolved, that though a man hath been out of possession of land by sixty years, yet if his entry be not taken away, he may enter, & bring any possessory action of his own possession, for the first clause doth not bar any right, but prohibits that none shall have a writ of right, &c. of the possession of his ancestors, &c. but only of a seisin within sixty years; the first and second clause extend only to seisin auncestrell, the third to an action of his own possession, not to entry, the fourth by avowry, the fifth to a *formedon*, &c.

Note (reader) out of this, that when the tenant hath done homage and fealty, which the lord may inforce him to do, this shall be a seisin of all other services, as to avowry, though the lord, nor those by whom he claims, had seisin within sixty years.

ACTIONS OF SLANDER.

The Lord Cromwells Case, 20 of the Queen, fo. 12.

THE Lord Cromwell brought an action *de scandalis magnatum* against D. Vicar, *tam pro domina regina quam pro seipso*, upon the statute of 2 R. 2. ca' 5. The defendant said to the plaintiff, *it is no marvell though you like not of me, for you like of those that maintain sedition against the queens proceedings*, the defendant justifies specially, that he being vicar of N. the plaintiff procured I. T. and I. H. for to preach there, who in their sermons inveyed against the book of common prayer, and affirmed it to be superstitious; upon which the vicar inhibited them, for they had not license nor authority to preach; yet they proceeded by the incouragement of the plaintiff; and the plaintiff said to the defendant, *thou art a false varlet, I like not of thee*, to whom the defendant said, *it is no marvel though you like not of me, for you like of those*

(*innunendo*, the aforesaid I. T. and I. H.) that maintain sedition (*innunendo seditiosam illam doctrinam*) against the queens proceedings.

Resolved in this case, that the statute aforesaid, concerning the king, the judges, *ex officio*, ought to take notice of it, as they ought of all statutes that concern him.

Resolved, that the justification is good, for in case of slander, the sence of the words is to be taken, which may appear by the occasion of speech. *Sensus verborum ex causa dicendi accipiendus est, & sermones semper accipiendi sunt secundum subjectam materiam.* And here the sence of the words appears, and his meaning in speaking them, and that he did not intend any publique or violent sedition, as the word of it self imports; and God defend that the words of one by a strict and grammaticall construction, should be taken contrary to the manifest intent; as in an action for calling the plaintiff murderer, 'tis a good justification that the plaintiff confessing that he had killed divers hares with engines, the defendant said, *thou art a murderer*, and the defendant shall not be put to a general issue, when he confesses the words, and shews that they are not actionable, as in maintainance the defendant may justifie lawfull maintainance, whereupon the plaintiff replied that the defendant, *dixit, &c. verba predict. de injuria sua propria absq; tali causa*, upon this they were at issue, and after agreed.

Cutler and Dixons Case, 27 & 28 of the Queen, fo. 14.

IF one exhibit certain articles, to a justice of peace, against one, declaring divers great abuses and misdemeanours, &c. to the intent to bind him to the good behaviour; in this case the party accused shall not have any action upon the case, for it is in pursute of ordinary justice, and if such actions were permitted, none would complain for fear of infinite vexation.

*Sir Richard Buckley and Woods Case, 33 & 34 of
the Queen, fo. 14.*

WOOD exhibited a bill in the star-chamber against Sir R. B. and charged him with divers matters examinable there, and with other matters not determinable there, as that he was a maintainer of pirates and murderers, and a procurer of piracies, upon which Sir R. B. brought his action, &c. Resolved, that no action lyes for matter examinable there, though 'twas meerly false, because that 'twas in course of justice.

Resolved, that an action lyes for these words, not examinable there, for 'tis not done in course of justice, and great inconvenience would follow, if matters may be inserted in bills exhibited in so high and honourable a court in slander of the parties, and they cannot answer there for their purgation, nor have their action for purging themselves of the crimes, and recover damages for the wrong, but that the said bill shall remain alwayes of record to their infamy, & here no murder or piracy can be punished upon any bill exhibited in English, for he ought to have been indicted, and therefore he hath not only mistaken the court, but also the nature of exhibiting the bill hath not appearance of any ordinary course of justice, but no action lies upon an appeal of murder, returnable in the *common bench*, for though the writ is not returned before competent judges, who may do justice, yet 'tis in nature of a lawfull sute, namely, by writ of appeal, wherefore judgement was given for the plaintiff. And in a writ of error in the chequer chamber brought by Wood, 'twas resolved, that Sir R. B. might have had a good action, but here, because the action was not upon the bill exhibited at *Westminster*, but because he said in the county of S. that his bill was true, *in auditu quam plurimorum*, without expressing the said matters in particular, so that it was not any slaunder, judgement was reversed.

Stanhop and Bliths Case, 27 of the Queen, fo. 15.

MASTER *Stanhop* (who was a surveyor of the Dutchy, and had divers offices, and was a justice of peace) *hath but one mannor, and that he hath gotten by swearing, and forswearing.* Resolved, that the action doth not lie, for they are too general, and words which charge any one, in an action in which damages shall be recovered, ought to have convenient certainty ; and he doth not charge the plaintiff with swearing, &c. and he may recover a mannor by swearing, &c. yet not procuring or assenting to it. Resolved, if one charge another that he hath forsworn himself, no action lies. First, because he may be forsworn in usual communication. *Quia benignior sensus in verbis generalibus seu dubiis est præferenda.* Secondly, it is an usual word of passion and choler, as also to call another a villain, a rogue, a varlet, these and such like will not maintain action, *boni judicis interest, lites dirimere.* But if one say to another that he is perjured, or that he hath forsworn himself in such a court, &c. for these words an action will lie.

Hext, Justice of Peace, against Yeomans, 27 of the Queen, fo. 15.

FOR my ground in *H. Hext seeks my life, and if I could find one I. H. I do not doubt, but within two dayes, to arrest Hext for suspition of felony.* Adjudged that no action lyes for the first words ; 1. Because he may seek his life lawfully upon just cause, & his land may be holden of him ; 2. 'Tis too general, and the law inflicts no punishment for seeking of his life ; but adjudged that the action lyes for the last words ; for, for suspition of felony he shall be imprisoned, and his life in question.

Birchleys Case, 27 & 28 of the Queen, fo. 16.

THE defendant said to B. (clerk of the kings bench, and sworn to deal duely without corruption) *you are well known to be a corrupt man, and to deal corruptly.* Adjudged that the action lyes; 1. Because the words, *ex causa dicendi*, imply that he hath dealt corruptly in his profession, *et sermo relatus ad personam intelligi debet de conditione personæ*; 1. This touches the plaintiff in his oath; 2. The words scandalize him in the duty of his profession, by which he gets his living. *Skinner of London* said, that *Manwood was a corrupt judge*; adjudged actionable. Resolved in this case, that if the precedent parlance had been that B. was a usurer, or executor of another, and would not perform the will, and upon this the defendant had spoken the words following, no action would lye.

Weaver and Caridens Case, 37 of the Queen, fo. 16.

ADJUDGED, that no action lyes for saying that the plaintiff was detected for perjury in the star chamber; for an honest man may be detected, but not convicted.

Stuckley and Bulheade Case, 44 & 45 of the Queen, fo. 16.

ADJUDGED, that an action lyes for saying, *master St.* (he was a justice of peace) *covereth and hideth felonies, and is not worthy to be a justice of peace*; for this is against his oath, and his office, and a good cause to put him out of commission, and for that he may be indicted and fined.

Snagg and Gees Case, 39 of the Queen, fo. 16.

THOU hast killed my wife, and art a traytor. Adjudged that the action will not lye, for the wife was in life, as appeared in the declaration, and so the words vain and no scandal; otherwise if she had been dead.

Eaton and Allens Case, 40 of the Queen, fo. 16.

HE is a bragler and a quarreller, for he gave his champion counsel to make a deed of gift of his goods to kill me. & then to fly out of the country, but God preserved me, Resolved, that the action will not lie, for the purpose without act is not punishable, and though he may be punished for such conspiracy in the star-chamber, yet this is by the absolute power of the court, not by ordinary course of law. Observe well this case, and the cause and reason of this judgment.

Anne Davies Case, 35 of the Queen, fo. 16.

THE defendant said to B. (a sutor to the plaintiff, and with whom there was near an agreement of marriage,) *I know Davies daughter well, she did dwel in Cheapside and a grocer did get her with child;* and the plaintiff declared, that by reason thereof, the said B. refused to take her to wife.

Resolved, the action lies, for a woman is punishable for a bastard, by 18 of the queen, *ca. 3.* And though that fornication, &c. is not examinable by our law, because done in secret, and uncomly openly to be examined, yet the having a bastard is apparent, and examinable by the said act.

Resolved, if the plaintiff had been charged with nude incontinency only, the action lies, for the ground of the action is temporall, *viz.* the defeating of her advancement in marriage. By *Popham* an action lies for saying that a woman inholder, had a great infectious disease, by which she loses her guests. *Bannister and Bannisters Case, 25 of the queen.* Resolved, that an action lies for saying of the sonne and heir, that he was a bastard, for this tends to his disinherison; but resolved, if the defendant pretend that the plaintiff is a bastard, and he himself right heir, no action lies, and this the defendant may shew by way of bar.

James Case, 41 & 42 of the Queen, fo. 17.

THE defendant said to B. *hang him*, (*innuendo prædict. L.*) *he is full of the pox*, (*innuendo the French pox.*) &c. Resolved, two things are requisite to have an action for slander; 1. That the person scandalized be certain; 2. That the scandall shall be apparent by the words themselves. And therefore if a man says that one of the servants of B. is a notorious felon or traytor, an action lies not, (if he have more servants,) and (*innuendo*) cannot make it certain. So, I know one near about B. that is a notorious thief. But if two speak of B. and the one sayes *he is a notorious thief*, an action lyes, and B. may reduce this to a certainty by (*innuendo prædict. B.*) for the office of an *innuendo* is for to design the person that was named in certain before, and in effect, stands in place of (*præd.*) but *innuendo* cannot make that certain which was incertain before, and subject to a deceiveable conjecture. But if one sayes to B. *thou art a traitor*, an action lies, for *constat de persona*. So here, when two speak of the plaintiff, and one sayes *hang him*, there *innuendo* will denote the person, but *innuendo* cannot extend for to make the intent to be the *French pox*, by imagination, which is not apparent by the precedent words; and the words themselves shall be taken in *mitiori sensu*.

Oxford and his Wife against Crosse, 41 of the Queen, fo. 18.

THE plaintiffs brought an action in *London* for calling the wife of the plaintiff *whore*; the defendant removed this out of *London* by *habeas corpus*, a *procedendo* was prayed, because the action was maintainable in *London*, though not at common law; denied by the court, for such custom to maintain an action for brabbling words is against law.

*Sir G. Gerard, Master of the Rolls, against Mary
Dickinson, 32 & 33 of the Queen, fo. 18.*

THE plaintiff counts that he was in communication with R. E. for to demise to him the mannor, &c. The defendant said (*præmissorum non ignara*,) *I have a lease of 90 years of the mannor*, and then shewed and published a demise made by the Lord *Audley*, grandfather of the Lord *A.* from whom the plaintiff claims, where in truth the defendant knew this to be counterfeit, by reason of which, &c. R. E. did not proceed, &c. The defendant pleaded, *quod talis indentura*, (*qualis* in the count,) came to his hands by trover, and traversed, that he knew of the forgery.

Resolved, if the defendant affirm and publish that the plaintiff had not right, but that she her self had, no action lyes, though she hath no right, because she pretends title, for if an action should lie, how could any one claim, or sue, or seek counsel for any land? *Banisters Case*, before resolved according, and therefore 'twas here resolved, that no action lies for saying *I have a lease*, &c. though it be false. And though it appears by the barre, that she had no title, but is a stranger, yet, because the matter in the count doth not maintain the action, the bar shall not make it good.

Resolved, that there was other matter in the count sufficient to maintain the action, *viz.* that the defendant knew of the communication, and that the lease was forged, and yet published, by which the plaintiff lost his bargain.

Resolved, that the bar was insufficient, for the knowing of the defendant, or forgery, is not traversable; as in an action for that the dogge of the defendant had bit the beasts of the plaintiff, *ipse sciens canem suum ad mordendas oves consuetum*. (*Sciens*) is not traversable, but it ought to be proved upon the general issue, for (*sciens*) is not a direct allegation, nor alleged in any place. And *talis indentura, qualis*, is no direct answer to the indenture mentioned in the count, for *talis, non est eadem*, and no *simile est idem*.

Barhams Case, 44 & 45 of the Queen, fo. 20.

MASTER Barham did burn my barn (innuendo a barn with corn) with his own hands, and none but he. Moved in arrest of judgement that the words were not actionable, for tis not felony to burn a barn, if it be not parcell of a mansion house, or full of corn; and in such case *agitur civiliter, not criminaliter, & verba accipienda sunt in mitiori sensu.* And the (innuendo) will not serve when the words are not slanderous.

Britteridges Case, 44 & 45 of the Queen, fo. 19.

B. is a perjured old knave, and that is to be proved by a stake parting the land of A. and B. Resolved, that the action lies for the first words. And adjective words will maintain an action, when they presume an act committed, (as here,) or when they scandalize a man in his office, or function, or trade by which he acquires his living. *Philips*, batchelor of divinity, brought an action against *B.* for saying, *thou hast made a seditious sermon, and moved the people to sedition this day;* adjudged the action lies, because though the first part of the words were merely adjective, they scandalized him in his function. So, if a man sayes to a merchant, that he is a *bankruptly knave*, or a *bankrupt knave*, as 'twas adjudged in *Mittons Case*, or that he will be a *bankrupt* within two daies; but an action lies not when these adjective words import not an act done, but an inclination, which doth not scandal him in function, &c.

Resolved, in the case at barre, that upon all the words together, no action lies, for the last words explain his intent to be of no judiciall perjury. And 'tis not possible that a stake can prove a man perjured; as it hath been adjudged; *thou art a thief, for thou hast stollen my apples out of my orchard; or robbed my hop-ground,* *Dobbins and Franklins Case, 43 & 44 of the queen*, but if the counsel of the plaintiff had disclosed the truth of the case in the count, an action would lye, for in truth there was a controversie betwixt two, whether the stake stood upon the land of the one, or the other, or as an indifferent boundary,



and the plaintiff was deposed in an action for this, as a witness; and by the pretence of the defendant, had perjured himself in his deposition.

Palmer and Thorpes Case, 25 of the Queen, fo. 20. touching defamation in the ecclesiastical court.

RESOLVED, that such defamation ought to have three incidents; 1. That the matter be merely spiritual and determinable in the ecclesiastical court, as for calling heretique, schismaticque, advowterer, fornicator; 2. It ought to concern matter merely spiritual only, for if it concern any thing determinable at common law, the ecclesiastical judge shall not have consueance of it. See for this 22 E. 4. 20. *The Abbot of St. Albans Case*; 3. Though the thing be merely spiritual, yet he which is defamed cannot sue there for amends or damages, but the sute there ought to be onely for punishment of the offender, *pro salute animæ*. For this, see *articulis cleri*, & *circumspecte agatis*, & *Fitz. 51, 52, 53*. But the plaintiff shall recover costs there, and there if the defendant, to redeem his penance, agree to pay a certain summe, the party may sue for this there, and no prohibition lyes.

COPY-HOLD CASES.

Browns Case, 23 & 24 of the Queen, fo. 21.

COPY-HOLDER in fee, by licence, leases for years and dyes, the eldest sonne dyes before admittance, adjudged that the daughter of the intire bloud shall have it, not the younger sonne. Resolved, though a copy-holder, in judgement of law, hath but an estate at will, yet custom hath so established and fixed his estate, that by the custom of the mannor 'tis descendable to his heirs, and is not merely *ad voluntatem domini*, but, &c. *secundum consuetudinem manerii*; so the custom is of the soul and life of copy-holds. See the book at large, of what antiquity copy-holds are, and some general learning concerning them.

Resolved, when custom hath created such inheritances, the law shall direct the descent according to the maximes and rules of the common law, as incident to every estate

descendable. When uses had gained a reputation of inheritances, the law directed the descent, & of them there shall be a *possessio fratris*. But resolved, that such customary inheritances shall not have any collateral qualities, which do not concern descent of inheritance, which other inheritances have; and therefore they shall not be assets to the heir, upon an obligation, nor there shall not be dower, nor tenancy by the curtesie, not a descent shall toll entry, &c. For, as without custom they cannot descend, so without custom they cannot have a collateral quality; for copy-holders have inheritances *secundum quid*, viz. to descend to the heirs and not to be determined by the will of the lord, nor *simpliciter*, to a collateral quality.

Resolved, that the heir, before admittance, may take the profits, and may surrender to the use of another, before admittance; but this shall not prejudice the lord for his fine upon the descent, and he is a tenant by copy of court-roll, for the roll made to his ancestor belongs to him, and admittance of tenant for life shall serve for the remainder, yet it shall not prejudice the lord for his fine. And though 'twas objected that every admittance amounts to a grant, and so may be pleaded, and therefore nothing vests before admittance, yet 'twas resolved that as after admittance, the heir may in pleading allege this is a grant, and this to avoid inconveniences, (for, if he should be compelled to shew the first grant, it was before time of memory, and so not pleadable, or if within memory, then the custome fails,) yet he may allege the admittance of his ancestor, as a grant, and shew the descent to him, and that he entered, and this without admittance, but he cannot plead that his father was seized, &c. by copy, &c. and died seized, and that this descended, &c. For in truth 'tis but a particular estate at will in judgment of law, though descendable by custome.

Ryvets Case, 24 of the Queen, fo. 22.

AGREED, that a husband shall not be tenant by the curtiesie of a copy-hold, without speciall custome.

Deale and Rigdens Case, 36 of the Queen, fo. 23.

ADJUDGED, that if a recovery be in plaint in nature of a reall action, against tenant in tail, (admitting copy-hold may be intailed,) that this is a discontinuance, for, in as much as plaints are warranted by custome, 'tis incident that it should make a discontinuance. The like judgement was between *Glun* and *Pease*.

Bullock and Dibleys Case, 35 of the Queen, fo. 23.

RESOLVED, that a surrender by the husband is no discontinuance to the wife, nor her heirs. And if a copyholder for life surrender to the use of another in fee, this is no forfeiture, for it doth not pass by livery. And copy-holders have not such quality, without speciall custome; so also adjudged in severall cases.

Gravenor and Teds Case, 35 & 36 of the Queen, fo. 23.

RESOLVED, that the descent of a copyhold doth not toll entry, and that where the custome was, that he may grant in fee simple, that he may, by the same custome, grant to a man and the heirs of his body; for be it a fee simple conditionall, or a tail, 'tis within the custome, so, of a grant for life, or years, for fee simple includes them.

Fitch and Huckleys Case, 36 of the Queen, fo. 23.

RESOLVED, that admittance of a copyholder for life is an admittance of him in remainder, but not to prejudice the lord for his fine. And that upon a surrender, to the use of himself for life, and after to the use of his last will, that the fee remains in the copy-holder, not in the lord.

Clark and Pennifathers Case, 26 of the Queen, fo. 23.

RESOLVED, that the heir of a copyholder may enter, and have trespass, before admission, and if the heir (as the principal case was) dye before admission, his heir may take the profits, and have trespass. And *Wray* said, that 'twas adjudged that there shall be *possessio fratris* of it. Resolved, that where *H. 8.* granted a mannor to the queen for life, that the queen was a sole person exempted by common law, and may make a lease, or grant, without the king, and may plead and be impleaded: and that 32 *H. 8.* is but a declaration of the common law.

Adjudged that a grant of a copy-hold in fee, escheated to her, by the queen tenant for life, binds the king, his heirs and successors, for she was *domina pro tempore*, and the custom of the mannor binds the king. And that every one who hath a lawful interest in a mannor, &c. though but at will, may grant copy-holds escheated, &c. rendring the ancient rent, customes and services, and this shall bind the lord, for he is *dominus pro tempore*. For a copyholder derives not his interest out of the estate of the lord only, but out of the custome, and the grantee is in by that, without regard to the estate or person of the grantor; and therefore such a grant by the husband shall bind the wife; so, of infants, *non compos mentis*, bishop prebend, parson, shall bind for ever, for the custome is, that the tenements are parcel of the mannor, and demised and demisable, &c. But the lord must have a lawful estate; for, if a disseisor, or feoffee of a disseisor, &c. makes such grants, this shall not bind him that hath right, after a re-continuance of the mannor; but admittance by such upon a surrender, or of the heir, shall bind, &c. for they are lawfull, & *quodam modo* judiciall acts, which to do he may be compelled in a court of equity.

P. 26 of the Queen, fo. 24.

ADJUDGED, if a lord takes wife, and a copy-holder for life (according to the custome) dies, and the lord re-grants for lives, and dies, that the wife, in dower, shall not avoid these grants, for though the grant were after the title of dower, yet, the custome was before. If a feoffee upon condition makes a voluntary grant, the condition is broken, the feoffor re-enters, the grant shall stand.

Rous and Arters Case, 29 of the Queen, fo. 24.

ADJUDGED, that if tenant *pur auter vie*, of a mannor, after the death of *cestuy que vie*, continues in, and holds courts, and makes voluntary grants, this shall not bind the lessor, (otherwise the admittances upon surrenders, or descents,) for he was tenant at sufferance, who hath no lawfull interest, and a writ of entry *ad terminum qui prateriit* lies against him, and so he is a deforceor.

Murrell and Smiths Case, 33 and 34 of the Queen, fo. 24.

THE queen grants a copy-hold in fee, and after grants the inheritance of the copy-hold to a stranger; the copy-holder devises to M. and after surrenders to the use of his will. Resolved, that custome hath so established the estate of a copy-holder, that by severance of the inheritance of the copy-hold from the mannor, the copy-hold is not destroyed, for, being the lord himself could not ouste the copy-holders, no more can another claiming in by him. Objected, that every copy-hold ought to be parcell of the mannor; and to be demised, or demisable, time out of memory. Resolved, that because once this had both the incidents aforesaid, and its perfection, the severance made by the lord shall not destroy it.

Resolved, that notwithstanding the surrender, and devise, the copy-hold descended to the heir, for after the severance of the inheritance from the mannor, the sur-

render was utterly void, for the land was not parcell of the mannor at the time, and the devise only cannot trans-ferre such a customary estate, but it ought to be by sur-render into the hands of the lord, &c.

Resolved, that after severance, the copy-holder shall pay his rent to the feoffee, and shall pay, and do other services which are due, without admittance or holding of a court, as to plough the demans of the lord, heriot, &c. but suit of court, and fine upon alienation or admittance, are gone, for now the land cannot be alienated, for though the copyholder hath some benefit by the severance, as appears before, so he hath great prejudice, for now he cannot surrender, or alien his estate, nor the feoffee cannot make an admittance, for he is not *dominus pro tempore*.

Resolved, that such forfeitures remain as were before the severance, as feoffment, lease, wast, denier of rent: so, if the land were of the nature of borough *english* or gavelkind, and other customes which run with the land remain. And 'twas said that such copyholder hath no other means to alien, but by decree in chancery against him and his heirs, but by this the interest of the land is not bound, but the person only.

Kite and Queintons Case, 31 of the Queen, fo. 25.

COPYHOLDER in fee surrenders out of court, by the custome, to the hands of certain copy-hold tenants, to the use of another and his heirs, upon certain condition, at the next court the surrender was presented, but the condition omitted, he, to whose use, &c. dies, the lord admits his heir, he that made the surrender releases to the heir being in possession, and after enters.

Resolved, that the presentment of the surrender was void, for that the condition was omitted, for the surrender that the copiholder made, was not presented, but if the surrender & the condition had been presented, and the steward in entring of it omits the condition, upon sufficient proof of it, the surrender shall not be avoyded, but the roll amended, for the roll doth not conclude the party for to plead, or give in evidence the truth of the matter.

Resolved, if a copy-holder be ousted by wrong, a release to him by the disseisor, doth not transfer his right, because he hath not any customary estate upon which the release of the customary right may inure, and this should be prejudicial to the lord, for by this he shall lose his fine and services; but a release made to him, which is admitted by the lord, and in possession, is good; and a release of a customary right may inure to him, and the lord not prejudiced, and the release shall inure by way of extinguishment. And *Littleton* speaks of an alienation by surrender only, which ought to be into the hands of the lord; but a release cannot be done to the lord; and *Littleton* says he which claims a copyhold by surrender hath no other evidence, but he which claims an extinguishment of a right may have it by release, by deed, and 'tis not perill to purchasors, for if the copyholder in possession sels it he will shew the release, and he which out of possession cannot sel till he hath gained the possession, & caveat emptor. By *Wray*, if he which hath a pretended title, &c. to a copyhold, bargains, &c. this is within 32 H. 8. for the statute says (*any right or title*) and great part of the land within the realm is in his copy, and therefore the intention was to include them, to avoid maintenance and champerty.

McLewich and Lutens Case, 30 of the *Queen*, fo. 26.

RESOLV'D, that the lessee of a copyholder for a year, shall maintain an *ej' firmæ*, for his term being war-rapt by law, by force of the generall custome of the realm, 'tis reason that he should have remedy by *ej' firmæ*, and this is a speedy course against a stranger. Resolved, that the copy-holds are not destroyed by severance of the inheritance of them from the mannor, but remain in force. So *Murrels Case* before adjudged.

Resolved, that when the lord of a mannor, having many ancient copy-holds in a town, grants the inheritance of all the copyholds, the grantee may hold a court for the customary tenants, and accept surrenders, and make admittances, and grants; for every mannor which consists of free-holders, and copiholders, comprehends in effect two severall courts, the one the court baron for free-holders, and in this the suitors, viz. the freeholders, are judges, and the other court for the copyholder, and in

this, the steward, or the lord himself, is judge; and though this is not a mannor in law, because it wants freeholdders, yet the grantee may hold such court as aforesaid, for copyholders only, as the grantor himself might. So, if all the freehold escheat, or the lord releases the tenure, and services, yet he may hold a customary court for the copyholds. *Note (reader)* though the lord, by his own act, cannot make of one and the same mannor, at common law, divers severall mannors, consisting of demeans and freeholdders, yet he may make a customary mannor of copyholders.

Resolved, that the lord himself may make a grant or admittance of a copy-holder, out of the mannor, at what place he pleases, but, if the steward, at any court holden out of the mannor, shall make grants or admittances, they are void.

Neals Case, 37 of the Queen, fo. 26.

ADJUDGED, that where the lord of a mannor demises all his lands, granted by copy, for two thousand years, that the lessee may hold courts, for copyholders, (as *Melwiches Case* is before,) and 'twas said so to be resolved in *C. Hattons Case*. *Note (reader)* a good diversity, where the number of the copyholders may support the custome, and a singular case of a copyholder, (as in *Murrels Case* before,) in which case the lord doth not grant tacitly any customary court.

Clifton and Molineux Case, 27 & 28 of the Queen, fo. 27.

RESOLVED, if a steward hold court out of the mannor, all grants and admittances there made are void, for the court ought to be holden within the mannor, not out of the jurisdiction of it; (as *Melwich Case* is before;) but resolved that by custome, the court may be holden out of the mannor, and grants, &c. shall be good, as *abbots*, &c. used for to hold court, at one mannor, for divers severall mannors. Resolved, that if a woman, copy-holder for life, takes husband, who commits wast, and dyes, the copyhold is forfeited, otherwise, if a stranger does wast, without the assent of the husband.

Taverner and Cromwells Case, 26 of the Queen, fo. 27.

RESOLVED, if a copiholder, seized of three several copy-holds, of three several acres, makes wast in part of one, &c. all that is forfeited, but not the others, for though they are all in one hand, yet every one is severally holden, and a severall condition in law annexed, and the severall conditions follow the severall tenures. So, resolved, if the copy-holder surrender them to the use of A. and the lord admits A. *tenendum per antiqua servitia inde prius deibta & de jure consueta*; and A. makes a forfeiture in one, he shall forfeit that only, for the *tenendum* (*reddendo singula singulis*) continues the severall tenures, so that 'tis not materiall if the copy-holds are in one or severall copies. So if diverse several copyholds escheat to the lord, and he grants them *tenendum per antiqua servitia*, they shall be severally holden as they were before, though he grants them to one man.

Resolved, that when he to whose use a surrender is made is admitted, he is in by him that surrendered, and in a plaint in the nature of an entry in the *per*, shall be supposed in by him, for the lord is but an instrument to make the admittance, and his charge shall not bind him that is admitted. So (reader) where before 'tis said that by the forfeiture of the husband all the estate of the wife shall be forfeited, 'tis to be intended all the copyhold under the said tenures.

Hubbard and Hamonds Case, 42 & 43 of the Queen, fo. 27.

RESOLVED, that if the fines of copyholders upon admittances be incertain, the lord cannot exact excessively and unreasonable fines, if he does, the copiholder may deny to pay it, without forfeiture, and it shall be determined before the judges, upon a demurer, or evidence upon proof of the value of the land, what fine was reasonable to be demanded; for if it should be otherwise, great part of the copyholds should be destroyed at the will of the lord, and so was *Hodsons Case* adjudged.

Resolved, if the lord asseſſe a reasonable fine, and require the copy-holder to pay it, he is not bound to pay it presently, because he could not know what the lord would asseſſe, & *nemo tenetur divinare*, and he ſhal have a convenient time to pay it if the lord limits no time, otherwise of a fine certain.

Resolved, if a copy-holder hath severall copy-holds, by severall ſervices, the lord ought to asseſſe and demand fines severally for every parcel, and the tenant may reſuſe to pay his fine for one, and forfeit that only, and every ſeveral tenure hath severall conditions in law tacitely annexed to it. So, if all the severall copy-holds are ſurrendered to the uſe of another, and the lord admits him, *tenendum per antiqua ſervitia*, &c. the tenures are ſeverall, and fines ſeverall. *Taverns ca'* before. Resolved that no fine is due to the lord till admittance, for admittance is the cauſe of the fine, and if after the tenant deny to pay it, 'tis a forfeiture. *Bacon and Flatmans Case*, and *Sands Case* ſo reſolved.

Westwick and Wyers Case, 33 of the Queen, fo. 28.

A woman, copy-holder in fee, ſurrenders to the uſe of W. her ſonne in fee, and at the next court, the entry was *ad hanc curiam venit, W. and I. uxor ejus, & ceperunt*, &c. W. died, I. his wife ſurvived and ſurrendered to the uſe of I. S. in fee. Resolved, when the lord hath the copy-hold by ſurrender, to the uſe of another, he hath but a cuſtomary power to make admittance, *secundum formam & effectum sursum redditionis*; and 'tis not like to the feoffee at common law, and though the lord grant this by copy to another, 'tis without warrant, and notwithstanding he might make an admittance, according to the ſurrender, and he which is admitted ſhall be in by him that ſurrendered, (as *Tavernors Case* is before,) and the court agreed, if the lord grant to *cestuy que uſe*, and a ſtranger, all ſhall inure to *cestuy que uſe*, or if he admits him upon condition, the condition is void. As executors agree that the legatory and I. S. ſhall have, &c. or, that the legatory ſhall have upon condition, the legatory ſhall have onely and abſolutely, for after the aſſent of the executors, he is in by the deviſee. And 'twas ſaid, that 'twas adjudged in *Buntings Case*, that where the lord admits one to hold to him and his heirs, (where the ſur-

render was for life only,) that he hath but for life. Resolved, that without speciall custome, or other speciall matter, the admittance shall inure only to the husband; and judgement was given according.

Bunting and Lepingwells Case, 27 & 28 of the Queen, fo. 29.

RESOLVED, that though T. who was husband of the wife, *de facto*, was not party to the libell, (for I. S. libelled against the wife, without naming her husband, for a divorce, upon a precontract betwixt him and the wife,) nor the sentence in the spirituall court, which dissolved the marriage betwixt him and his wife, yet the sentence against the wife only, being but declaratory, shall bind the husband *de facto*, and for that the consusance of the right of marriages belongs to the spirituall court, and they have given sentence in it, the judges of the common law (though it be against the reason of the law) shall give faith and credence to their proceedings and sentences, as consonant to the law of holy church; for, *cuilibet in sua arte perito est credendum*. So, 'twas adjudg'd that the plaintiff (born in the second marriage) was legitimate.

Resolved, when a copy-holder surrenders to the lord, to the use of his wife and his younger son, without limiting any estate, they have for life only, for as well estates as discents shall be directed by the rules of law, as necessary consequents upon the custome, except there be a speciall custome within the mannor, that *sibi & suis*, or *sibi & assignatis*, may create an estate of inheritance, and 'twas observ'd that the estates limited upon surrenders, are alwaies annexed to the estates of him to whom the surrender is made, and alwaies the surrender to the lord is generall, without limitation of any estate. Resolved, that when the lord admits *cestuy que use*, for life, the reversion is in him that surrendered, not in the lord, for he is but an instrument.

Resolved, that a man may surrender to the use of his wife, though that *cestuy que use* is in by him that surrendered, because the husband did not do this immediately to the wife, but by a second means, *viz.* by surrender to the lord, and by admittance of the lord.

Resolved, that when B. surrendered out of court, and before that 'twas presented in court, he dyes, yet after being presented according to the custome, 'tis good, otherwise, if it had not been presented according to the custome; so, if the tenants in whose hands, &c. dies, yet if it be proved, 'tis good enough; so *Queintons Case* before, if *vestuy que use*, &c. dies before admittance, his heirs shall be admitted.

Down and Hopkins Case, 36 of the Queen, fo. 29.

RESOLVED, that where the custome of a mannor was to grant copies for one, two, or three lives, that a grant to a woman during her viduity, is within the custome, or 'tis an estate for life, but every grant for life is not *durante viduitate*, issue was, whether the custome was that the wife of a copy-holder, after the death of the husband, should have for life, and 'twas given in evidence that she should have during her viduity, and adjudged that the evidence did not maintain such custome, for 'tis a less estate then for life. But in the principal case, 'tis a greater estate which is warranted by the custome, and therefore a lesse is within it, (according to *Gravenars Case* before.) 'Twas said, that a lord may retein a steward by word, to hold courts, &c. as a bayliff, and this retainer shall serve till he be discharged.

Harris and Jayes Case, 41 of the Queen, fo. 30.

RESOLVED, that a lord may retain one to be steward of his mannor, and to hold courts by word as in the case before. Resolved, that where a copy-hold escheats by attainder of felony of a copy-holder of the queen, that the steward may grant it over, *ex officio*, without speciall warrant, for the custome warrants the steward to grant it, and this shall bind the queen and her heirs, &c. But yet his duty is before to inform the lord treasurer, chancellor, or barons of the exchequer, or any of them, for his better direction.

Resolved, that the auditor or receiver of the queen hath no power to retain a steward to hold courts, &c. But it behooves that the steward (who makes such volun-

tary grants upon escheats, or forfeitures to be good,) to have letters patents of the stewards of the same mannor.

And 'twas said, that 'twas adjudged in the lady *Holcroft's* Case, that where one was retained generally by word, to be steward of a mannor, and to hold courts that he may take surrenders of customary tenants out of court.

Shaw and Thompsons Case, 37 of the Queen, fo. 30.

RESOLVED, that a woman shall not be indowed of copy-hold without speciall custome; and that when a woman is to be indowed by custome, shee shall have all incidents to dower, and shall recover dammagés by the statute of *Merton*, because her husband died seised, and therefore the recovery of damage of 50*l.* in the court of the mannor, was allowed though this exceeded 40*s.*

Resolved, that no action of debt lyes for these damages at common law, for upon such judgement no error of false judgement lies, but the remedy is in the court of the mannor, or chancery. *Fenner*, Justice, said, that he had seen a record, 36 *H.* 8. where the lord, by petition to him, had, for certain errors in the proceeding, reversed such a judgment, and upon this, the defendant maintained an *audita quærela*, to be restored to the dammagés recovered against him. See 14 *H.* 4. cited before in *Browns Case*. And 7 *E.* 4. 29.

Hoe and Taylors Case, 37 of the Queen, fo. 30.

RESOLVED, that underwood growing upon parcel of the mannor, may by custome be granted by copy of court roll; and tis a thing of perpetuity, to which a custome may extend, for after every cutting the underwood grows, *ex stipitibus*. So, 'twas resolved that herbage, or any profit of any parcel of the mannor, may by custome be granted by copy; and 'twas said that a fair appendant to the mannor of C. in S. is granted by copy, and this example the reason of the first pillar in *Murrels Case*.

Frenches Case, 18 & 19 of the Queen, fo. 31.

RESOLVED, if the lord lease for years, life, or make any other estate by deed, or without deed, of copy-hold lands forfeited, escheated, &c. to him that this land can never be granted again by copy, for the custome is destroyed, for during these estates the land was not demised, nor demisable, by copy. So, if the lord make a feoffment, and enter for condition broken; but if the lord keep it in his hands a long time, or leases it at will, he, his heirs, or assigns may regrant it. So, if the interruption be tortious as by disseisin, and descent, false verdict or erroneous judgement: for, *non valet impedimentum, quod de jure non sortitur effectum, & quod contra legem fit, pro infecto habetur*. But if it be extended upon a statute or recognizance acknowledged by the lord, or if the wife of the lord hath his land assigned to her in dower, though these impediments are by act in law, yet for that the interruptions are lawfull, the land cannot be after granted by copy. If a copy-holder accept a lease for years of the lord, of his copy-hold, 'tis destroyed for ever. If a copy-holder take a lease for years of the mannor, his copy-hold hath not continuance, *Hides Case*, adjudged 17 of the queen. But there 'twas resolved, that such a lesse might regrant the copy to whom he would, for the land was alwaies demised or demisable. If a copy-holder be surrendered to the lessee, his executors or assigns may regrant it. If a copy-hold escheat to the lord, his alienee by fine, feoffment, &c. may grant it.

Foiston and Crachroodes Case, 29 & 30 of the Queen, fo. 31.

ADJUDGED, that where a copy-holder in pleading alleges, *quod infra man. præd. talis habetur nec non toto tempore cujus, &c. habebatur consuetudo, viz. quod quilibet tenentes prædictorum tenement. vocat. C.* have used to have common, in such a place parcel of the mannor, & that he is a copyholder of the said tenement, that this custome as well for the matter as the form was good: for the copy-holder cannot prescribe in his own name, for the exility and basenesse of his estate, and if he had claimed common

in the soile of another, he ought to prescribe in the name of the lord, viz. that the lord, and all his ancestors, and all those whose estates, &c. have had common in such a place, for him and his tenants at will; but when he claims this in the soile of the lord, he cannot prescribe in the name of the lord, for the lord cannot prescribe to have common, &c. in his own soile, and therefore he ought to alledge that within the mannor there is such a custome.

Note, a good diversity between a prescription which is personall, and alwaies made in the name of a certain person, or his ancestors, or those whose estates, &c. and a custome which is local and alledged in no person, but that within the mannor there is such a custome, this shall serve for those who cannot prescribe in their own name, nor in the name of any person certain, as the inhabitants of a town. Also the allegation of a custome shall serve when 'tis referred to a thing insensible, viz. that all such lands are devisable. And, for that in the principal case, the custome may have a lawfull commencement, that one copy-holder only shall have common, estovers, or other profit in the land of the lord, and that in many mannors; some copiholders have common in one waste of the mannor, and others in another severally, so that the custome cannot be applied to all, and because that all the other copyholds may be determined and extinct, 'twas adjudged the custome was well alleged. So, to have common of estovers in the wood of his lord parcell of the mannor, &c. was adjudged good, 10 of the queen, as 'twas said.

Myttons Case, 26 Eliz. fo. 32.

QUEEN *Elizabeth* by letters patents did grant the office of the clerkship of the county-court of Somerset to *Mytton*, with all fees, &c. for life. *Arthur Hopton*, Esquire, Sheriff of the same shire, interrupted him, because it was incident to his office. *Mytton* complained to the lords of the councill, and it was referred to the two Chief Justices, *Wray* and *Anderson*. And after many arguments concerning the validity of the grant, and conference had with all the other justices, it was resolved by all the justices, *nullo contradicente aut reluctantē*, that the said letters patents were void: and their reasons were, that the office of the sheriff was an ancient office before the conquest,

and of great trust and authority, for the king committeth unto him *custodiam comitatus* : and though the king may determine the office *ad bene placitum*, yet, he cannot determine this in part, as for one town, or hundred, nor abridge him in any incidents to his office ; for the office is entire, and ought to continue so without any fraction, or diminution without by parliament, and the county-court, and the entring of all proceedings therein, are incident to the sheriffs office, &c. And though 'twas granted when the office of the sheriff was void, yet the new sheriff shall avoid it ; as *Scroges Case*, in the time of vacation in the office of chief justice of the common bench, Queen *Mary* granted the office of the *Exigenter* of *London* ; resolved, that the next chief justice shall avoid it, for 'twas incident to his office.

Also in all writs directed to the sheriff concerning the county court, the king saies, *in comitatu tuo*, and in return of exigents made by him, he saies, *ad comitatum meum tent*. &c. and the style of the court proves it, and by the statute of 33 *H. 8.* *the sheriff of Denbigh shall keep his shire-court at*, &c. In a false judgment 'tis said, *in pleno com. tuo recordari facias*, &c. and in a precept of *Tolt*, 'tis said, *summonas*, &c. *quod sit ad comitatum meum*. And it should be very inconvenient that another should have the custody of the entries, and rols of court, which may be imbesilled, and the sheriff responsible for them. And it was resolved, that the custody of all the gaols within every county belongs to the sheriff by right, and are annexed and incident by the law to the sheriffs office, *vid. stat. An. 14 E. 3. ca. 10.*

Bozouns Case, 26 & 27 of the Queen, fo. 34.

A portion of tythes in *L.* appertained to the rectory of *G.* which was presentable, and the queen was seized of the rectory of *L. jure coronæ*, which was appropriated to the monastery of *W.* and grants to *B. ex gratia speciali*, &c. *totam illam portionem decimarum*, &c. in *L.* &c. *cum omnibus aliis decimis suis quibuscunq* ; in *L. tunc, vel nuper in occupatione*, *I. C.* & that the patents shall be of force *non obstante aliquibus defectibus in non nominando, male recitando*, &c. *alicujus occupatoris*, and *I. C.* had never any tithes in *L.*

Resolved, that (in the occupation of I. C.) referr to all the sentence, and not only to (*cum omnibus aliis decimis, &c.*) 1. Because (*illam*) demonstrates fully, that there ought to be words subsequent, to explain and reduce in certainty that portion, by the intention of the queen, should pass, viz. what which was in the occupation of I. C. and 'tis not satisfied till it become to the full end of the sentence; 2. This conjunction (*cum omnibus aliis, &c.*) couples the last words to the former, and makes the words subsequent to referr to all the sentence; 3. If all the tithes in L. of the said rectory should pass, the addition of the occupation of I. C. should be vain, & *maledicta expositio, &c.*

Resolved, that by grant of *portionem decimarum, &c.* the tithes parcell of the rectory of L. do not passe, for (*portion*) properly signifies a part or portion in gross, divided, and not parcell of the rectory, and the queen had not any portion in gross, but all were parcell of the rectory; and (*ex gratia speciali, &c.*) shall not extend by any strained construction, to make a thing pass, against the intention of the queen expressed in her grant, and against the apt, proper and usuall signification of the words of his grant.

Resolved, that because J. C. had not any tithes there, nothing passes, for admit that a portion should be taken for a part, then the effect of the grant is, *totam illam portionem decimarum in occupatione, J. C.* and in truth, he never had any part, nothing without question passes, in case of a common person, *a fortiori*, not in the case of the queen. As to the point, when a clause of *non obstante* shall make the grant of the queen good, when not.

Resolved, when the king by the common law cannot in any manner make a grant, there a *non obstante* of the common law will not make the grant good, against the reason of the common law; as the king grants a *protection* in an assise, or *quare impedit*, notwithstanding any law to the contrary, 'tis void, for protection lies not in these cases, for the losse which may come to the parties by such great delay. But when the king may lawfully make a grant, but the common law requires, that he be so instructed, that he be not deceived, there is a *non obstante* supplies it, and makes the grant good. As the king having made a lease for life, or years, grants the land, *non obstante*, that it be in lease for life, years, &c. or if he

grants the land, and further grants the reversion of it, depending upon an estate for life, years, &c. 'tis good. See the book at large.

Resolved, when the words are not sufficient, *ex vi termini*, to passe the thing granted, but the grant is void, there a *non obstante* will not serve, as in the principall case; and the patents were not holpen by 18 of the queen, *ca*. 2. for patents of concealment are expressly excepted out of the act.

Terringham's Case, 26 & 27 Eliz. in banco regis, fo. 36.

RESOLVED, that prescription doth not make a thing appendant, except the thing which is appendant agree in quality and nature to the thing unto which it should be appendant, as a thing incorporate, as an advowson to a thing corporate, as a mannor, or as a thing corporate, as lands, to a thing incorporate as an office, these may be appendant, but every thing incorporate may not be appendant to a thing corporate, as common of turbary may not be appendant to land, but to a messuage or house, as it is holden 5 Ass. 9. for the thing which is appendant ought to accord with the nature and quality of the thing to which it is appendant; and turves ought to be expended in a messuage.

The commencement of common appendant, by the ancient law, was in this manner, *viz.* when a lord of a mannor infeoffed another of arrable lands to hold of him in soccage, (*id est*,) *per servitium socæ* the feoffee *ad manutenend' servitium socæ* had common in the wasts of the lord for his necessary beasts that did plow & ayre his lands, & this common is of common right, and commenceth by operation of the law, and in favour of tillage, and therefore it needeth not to prescribe in that, for so it is holden 4 H. 6. & 22 H. 6. as one ought if it were against common right. But it is only appendant to the ancient arrable lands, and only for oxen, horses, kyne and sheep, &c. And because it is against the nature of common appendant to be appendant and meadow or pasture, and because that here the prescription was to have common time out of mind to a house, meadow, and pasture, as well as to arrable, by which it appears to the court, that there hath been a house, meadow, and pasture

time out of mind, 'twas resolved, that this common was appurtenant, not appendant. But if of later times, men have builded upon some part of such arrable lands, and some part thereof is imployed to a meadow and pasture, and this for maintenance of tillage, (the original cause of common,) the common remains appendant; and it shall be intended in respect of the continuall usage of the common for beasts levant and couchant upon such lands that at the beginning all was arrable. But in pleading he ought to prescribe that the same is appendant to land, for though *terra dicitur a terendo, quia vomere teritur*, yet *terra* includes all, and is arrable, though converted to meadow, &c. for it may be plowed.

A man may prescribe to have common appendant to his mannor, for all the demeans shall be intended arrable; at least, in construction of law, (*redd' singula singulis*,) it shall be appendant to such demeans which are ancient arrable, &c. And when a man claims common appendant to his mannor, no incongruity appears of his own shewing, as here. So common may be appendant to a carve of land, which may contain pasture, meadow, and wood, but it shall be applyed to that which agrees with the nature of the common.

Resolved, that common appendant may be apportioned, because 'tis of common right; for if a commoner purchase part of the lands, in which he hath common, yet the common shall be apportioned, as well as if the lord purchase parcell, if of the tenancy the rent shall be apportioned. And if A. a commoner enfeoff B. of parcel of his ancient lands, the common shall be apportioned, and B. shall have common *pro rata*. And 'twas agreed, that such common which is admeasurable, remains after severance of part of the land, to which, &c. But here, for that the common was appurtenant, 'twas adjudged, that by the purchase all was extinct, for 'twas against common right; for, by the act of the parties, it cannot be in *esse* for part, and extinct for part.

'Twas said that *pertinens* is the latine word, as well for appurtenant as appendant, and, therefore, *subjecta materia*, and the circumstances ought to direct the court to adjudge the common, appurtenant or appendant.

Resolved, that unity of possession of the entire land, to which, &c. and of the entire land in which, &c. extinguishes

the common appendant. By *Wray*, Chief Justice, common for vicinage is not appendant, but, for that it ought to be by prescription, 'tis resembled to common appendant, but common appurtenant, or in grosse, may commence at this day, by grant, or prescription; and by him, the one may inclose common for vicinage against the other: as hath been adjudged in *Smith* and *Redmans* Case. Resolved, that a man may chase out beasts that do him trespass, with a small dog, and shall not be compelled to distrain them damage feasant.

CASES OF APPEALS AND INDICTMENTS.

Brooks Case, 28 of the *Queen*, fo. 39.

RESOLVED, that in appeal of burglary, 'twas an insufficient count that the defendant *domum*, &c. *felonice & burglariter fregit*, for it ought to be *burglariter* or *burgulariter*, which is *vox artis*, as *murdravit rapuit*, which cannot be otherwise expressed.

Resolved, if the count had been sufficient, he being convicted once, should not be again impeached, but here he was discharged upon the insufficient count. By *Wray*, Chief Justice, if upon accident, a man and all his family are out of the house, and one in the interim breaks the house, and commits felony, 'tis burglary, for the indictment is, *domum mansionalem fregit* and so 'twas resolved, 38 of the queen, where a man hath two mansion houses, and servants in both, and in the night when the servants are out, &c. the house is broken, 'tis burglary.

Wetherell and Darhys Case, 25 of the *Queen*, fo. 40.

IN an appeal of murder, the defendant was found guilty of homicide, and had his clergy, after indicted, and arraigned for murther, pleaded this conviction. Resolved, that 'tis a good barr at common law, and restrained by no statute; the reason is, because the life of a man shall not be brought twice in question for the same offence.

Younge's Case, 28 of the Queen, fo. 40.

AN indictment that *dedit unam plagam mortalem circiter pectus*, is sufficient, for, 'tis incertain whether it be in the neck, arm, or belly; and indictments ought to be certain, and shew in what part the wound is, and the profundity and latitude, that it may appear to the court to be mortall, and one of the wounds incertainly alleged, makes the whole indictment insufficient. 'Twas said, that the indictment ought to have been, that if the party had not died of the first stroke, that he died of the other, and this is the common course.

Upon a sudden affray, if the constable, or any of his assistants in suppressing it, be kill'd, 'tis murder in law, though the murderer knew not the party killed, for the law adjudges it murder, and that he had malice prepense, for that he opposed him against justice. So, in case of a sheriff, or any of his bayliffs, or officers in execution of process; so, of a watchman.

Walkers Case, 41 of the Queen, fol. 41.

RESOLVED, that an indictment of murder (upon which the party was outlawed) that he stroke the dead in *sinistra parte ventris circa umbelicum*, was good, for *sinistra parte* was sufficient, and the other superfluous, but in *Younge* before, there was no certainty before the *circiter*.

Heydons Case, 18 of the Queen, fo. 41.

EXCEPTIONS to the indictment, 1. Because 'twas taken before B. *coronatore in com'. præd.* and doth not say *de com. præd.* Resolved, it shall be so taken by reasonable intendment, and the writ *de coronatore eligendo* is, *quia A. B. nuper unus coronator'. in com'. tuo diem clausit*, &c. and so 'tis taken in *Willoughbyes Case* in *Plo-don*. 2. Because he doth not say that E. S. (dead *fuit in pace Dei, & dominæ reginæ*; resolved, that they are only words of form, to amplyfye the hainousness of the offence,

not of substance, and perchance he was not in peace. 3. Because he doth not say, *felonice* nor *ex malitia sua præcogitata dedit*, &c. Resolved, that the word (*et*) couples the sentences together, so that these words (*felonice* & *ex malitia*, &c. first spoken referres to all the subsequent words, &c. and *tunc* & *ibidem* makes it clear. 4. The profundity of the wound is not shown; resolved, it cannot be here; for all the pan of the knee was cut off. 5. 'Tis said, *tempore feloniam præd. & muredredi*, where it should be *murdri*; resolved, the first words were sufficient, and then *muredredum* being a word insensible is superfluous, and shall not hurt. 6. The wound was the fourth of *August*, the death the nineteenth of *December*, and the indictment is, that T. M. &c. *tempore feloniam & muredredi præd. viz. 4. Augusti felonice fuer' præsentis & auxiliantes*, &c. 'Twas objected, that the death hath relation to the stroke; resolved, that indictments have been often adjudged insufficient, when the stroke is one day, the death another, and the jury conclude the death to be done the first day; but here it ought to have been, that they were *præsentis & auxiliantes*, &c. *'ad feloniam & muredredi præd.* and relation which is a fiction shall make no man a felon. And *Wray* said, that without question, the year of bringing the appeal shall be accounted from the death, not from the stroke.

Hume against Ogle, 32 & 33 of the Queen, fo. 42.

ADJUDGED, that the count (that the defendant gave the stroke the 27 of September, at D. in the county of N. and that her husband of the same stroke at D. &c. died, and so the same defendant murdered him at D. aforesaid) was repugnant and insufficient, for, as it cannot be said, that he murdered him the first day, (as *Heydons Case* is before,) so neither at the place where the stroke was, but where he died.

Hudson and Lees Case, 31 of the Queen, fo. 43.

IN an appeal, H. counted that the defendant, &c. *felo-nice* maimed him in his left hand, the defendant pleaded that before, &c. the plaintiff recovered in trespass for the same battery and wounding, 200*l.* and satisfaction acknowledged. Resolved, that the barre is good, for where the plaintiff is to recover damage only, (as in this case of appeal,) he shall not be twice satisfied for the same thing, *nemo debet bis puniri pro uno delicto*. And here the wounding in the first action includes the mayhem, & more, and the defendant hath averred that the wounding in the first action, and the mayhem here is one.

Syers Case, 32 of the Queen, fo. 43.

RESOLVED, if the principal be pardoned, or hath his clergy, the accessory cannot be arraigned, for 'tis a maxime *ubi factum nullum, ibi sortia nulla, & ubi non est principalis, non potest esse accessaris*, and none can be principall before it be so adjudged by law, *viz.* by judgement upon verdict or confession, or by outlawry; and it suffices not that in truth he be principall; and the acceptance of pardon, or prayer of clergy is an argument, but no judgement in law, that he is guilty. But if the principall, after attainder, be pardoned, or hath his clergy, the accessory shall be arraigned, for it appears judicially that there was a principall.

Bibithes Case, 39 of the Queen, fo. 43.

RESOLVED, that where the principal was found guilty of a man-slaughter, and not guilty of murder, and had his clergy, the accessory shall be discharged, for till judgement, it doth not appear judicially that there was a principall. So if the principal upon his arraignment, confesses the felony, & before judgement obtains pardon, or hath clergy. Resolved that there cannot be an accessor before the fact, in man-slaughter, for 'tis upon a suddain affray; and if premeditated, 'tis murder.

Vauxes Case, 33 of the Quern, fa. 44.

RESOLVED, that where a man was indicted for poisoning another, perswading him that the potion mixt with cantharides should cause him to have issue by his wife, the indictment (*nesciens præd. potum cum veneno fare mixtum, sed fidem adhibens præd. persuasioni dict. W. K. recipit, & bibit*) was sufficient, for 'tis not expressed that he received the poyson, (for *venenum præd.*) wants; and the words after (*immediate post receptionem veneni præd.*) are not sufficient to maintain an indictment, which ought to be certain, and not by implication.

Resolved, that *Vaux*, who perswaded, was a principall murderer, though he was not present at the receipt of the poison, and here he cannot be accessory, for there is no principall; and if any one had procured V. to do it, he had been accessory before, which note, a speciall case, where principall and accessory both are absent at the time of the felony.

Resolved, that (*autre foits acquite*) here is no plea, for he was discharged upon an arraignment upon this insufficient indictment, & the former acquittal, or conviction, ought to be lawfull, and the maxim is, that the life of a man shall not be twice in jeopardy for one offence, but here his life was not in jeopardy. So if a man be convicted by verdict, or confession, upon an insufficient indictment, & no judgement given, he may be again indicted and arraigned, for the law wants its end; but if upon such insufficient indictment, the felon hath judgement *quod suspendatur per collum*, and so attainted, (which is the end of the law,) he cannot be indicted again, &c. till this judgement be reversed; and upon such acquittall no conspiracy lyes.

Wrote and Wiggs Case, 33 & 34 of the Queen, fo. 45.

THE defendant in an appeal of murder pleads that *autre foits*, by inquisition taken before the coronor of the queens household, and B. one of the coronors of M. he was indicted of man-slaughter, which inquisition was certified to N. at the gaol delivery, and the defendant upon this was arraigned, confessed the felony, and had his clergy, and it appears the arraignment, &c. was after the purchase of the writ of appeal, and before the return.

Resolved, that *autre foits* convict of man-slaughter and clergy, is a good barre in an appeal of murder, as 'twas adjudged in *Holerosts Case*. In which it was likewise resolved, that an inquisition taken before B. coronor of the household, &c. and one of the coronors of M. is well taken, and within the statute of *articuli super chartas*, though the statute requires two persons; for the intent of the act was performed, and the mischief recited avoyded, for though the court removes, yet he may proceed as coronor of the county.

Resolved, also upon the statute of 3 *H. 7. ca. 1.* that this case was out of the statute; for if the defendant had his clergy, the appeal lyes not, *a fortiori*, when he is convicted only, and prayes his clergy; and the act of the court to be advised as to the allowance of clergy (so the case was) shall not prejudice the party in case of life: and 'twas resolved, that attain of murder in the act extends to a person convicted by confession, or verdict, as to a person attaint, for he which is attainted, is convicted and more. And *Agnes Gainfords Case* adjudged, that where 3 *H. 7.* is, *that the wife or heir of him so slain shall have appeal*, that the heir of a woman, &c. shall have it against him who was acquitted of the same murder. So resolved here, an indictment and conviction, or acquittance of man-slaughter, is a barre to an indictment of the same death, for all is the same felony, though the circumstance alter it.

Resolved, that at common law, the coronor of the household had an exempt jurisdiction within the verge, and the coronor of the county could not meddle, as appears by *articuli super chartas*; and *Swifts Case* adjudged where a coronor of the county took an inquisition

within the verge, 'twas avoided by plea, the one cannot meddle within the power of the other. But justices of the kings bench, of *oyer and terminer*, &c. may inquire, hear, and determine all murders, &c. within the verge, for their authority is generall through all the county: so resolved in *Holcrofts Case*.

Resolved, that the indictment was sufficient, for it doth not appear that D. (where the stroke and death was) was within the verge, & though in truth it were within, yet it ought to be found by the oath of the indictors, and cannot be supplied by nude averment, and it shall not be void *Et coram non judice*, as to the coroner of the household, and good before the coroner of the county, for the record is intire, and taken intirely before them, &c. And the defendant in his plea had averred, that D. was within the verge, so the coroner of the county could not take the indictment only.

Resolved, for that the indictment (upon which he was convicted) was insufficient, that he may be newly indicted, &c. for his life never was in jeopardy. Resolved, that where the stroke was one day, the death another, the conclusion ought to be that he was murdered the day of his death, otherwise this naught, for 'twas not murder before: and 'twas resolved, that the finding of the stroke, and the death, were not sufficient of it self, without conclusion; and so T. W. murdered the said R. W. Resolved, that though the conviction were pending the appeal, yet it had been lawfull, and before that the defendant was compelled to plead it had been a good bar.

Waits Case, 45 of the Queen's fo. 47.

RESOLVED, that where a woman brought severall severall appeals against severall persons, as principalls, all ought to abate but the first, for all the principalls and the acceptors before the murder and after, and before the writ purchased, against whom the plaintiff will bring an appeal ought to be named in the writ: for all make default, except one, yet the plaintiff ought to count against all, therefore he ought to bring the appeal against all, and the defendant shall not have damages by the statute of W. 2. for it is out of it, because the writ is abated. And the statute of *Magna Charta* says (*appellatur*) in the singular number.

Hill's, 30 of the Queen, fo. 48.

AN indictment upon 8 H. 6. was quashed, *quia fuit inquisitio capta ad sessionem pacis in com'. S. ten'. die martis, & dies mercurii*; though the sessions may endure two or three daies, yet the record ought to mention that they were holden at a day certain; as also for that the statute was mis-recited in a point materiall. Note, because mis-recitall is fatall, the sure way is to draw the indictment with conclusion *contra formam statuti*, and with no recital of the act.

Ognels Case, 29 of the Queen, fo. 48.

AN executor possessed of a grange, consisting of divers parcels, demises all the grange (except H.) to A. for 23 years, and H. to F. for 23 years, and grants all the residue of his term in the intire grange to A., & F. B. the reversion; or grants a rent charge in fee, out of all his lands, &c. called C. grange *quondam in tenura B. (the testator,)* and now *in tenura & occupatione de A.* The rent is arrear, the intire term expires, the reversioner makes a feoffment, the grantee dies, the feoffee leases at will, the executor distrains for arrearages.

Resolved, that at common law, in some case, debt lies for arrearages of an annuity in fee, though it continues; as if a parson, or prebend resign, or dies, because the parson is chargeable, otherwise of a rent service, charge, or seck, when the freehold continues; and for a rent there is a diversity, when a rent in fee is extinct by the act of the party, and when of the law, and when particular estates expire: see the book at large. But it was resolved in the case at bar, that the arrearages due in the life of the grantee, were lost at common law. It was resolved, that H. was not charged with the rent, for though it be parcel of the grange, and A. and F. have the reversion of the term, and so it may be said in their tenure, yet, for that A. then had not H. in his occupation, 'tis not charged.

Resolved, that the lessee at will is chargeable by 32 H. 8. *cap. 10* for where things are due in right, and become remediless by the act of God, the parliament which

gives remedy for this shall be favourably construed, and extend to advance the remedy proportionably to the defect of the law, according to the mind of the makers, and therefore the feoffee of the feoffee *in infinitum* shall be charged, for otherwise the statute shall be in vain, &c.

Resolved, if the grantee in fee, or for life of a rent service or charge, (after 'tis arrear,) grants over, the tenant attorns, the grantor dies, his executors are not within the statute, for by the grant the arrerages are lost, and were not due to the testator *tempore mortis*, as the statute speaks; and after the grant the testator could not destrain for the arrerages; and the act gives remedy only where the arrerages are due, and become remediless by the act of God.

Sharp and Pooles Case, 17 of the queen, a rent was granted to a woman for life, 'tis arrear, she takes husband, 'tis arrear, the wife dies, the husband brings debt against the heir, being terretenant, for all arrerages. Resolved, that for the arrerages before the marriage he had no remedy at common law, but for the other he had debt.

Objected, that the husband shall not have the arrerages due before by this statute; 1. Because at common law the executors of the wife may have an action for them, and the statute gives remedy when executors cannot have an action, and doth not intend to toll the remedy from the common law; 2. The branch sayes (*due in the wives life*) so the arrerages ought to incur when she is his wife. Resolved to the contrary, for the statute sayes (*due and unpaid in the wives life*), and the common law gives remedy for the arrerages of an estate for life incurred in the life of the wife, and therefore the statute did not intend to extend to these arrerages, but to the arrerages due before, for *verba accipienda sunt cum effectu*.

Resolved, that a feme covert cannot make an executor without assent of her husband, and the administration of her goods of right belong to the husband. And the statute in naming the woman (*wife*) intends only to describe and designa the condition of the woman, not to imply that the arrerages ought to incur during coverture.

Rawlins Case, 29 & 30 of the Queen, fo. 52.

A. possessed of a house for thirty years, (except a stable of which B. was possessed for two years,) granted all his interest to C. and demised the stable to B. for six years by indenture after the end of the two years; C. redemises all to A. for twenty one years, rendring twenty pounds *per annum*, and to pay a fine of twenty five pounds upon condition for to re-enter for non-payment of the rent or fine: before the day of payment, A. redemises the stable to C. for ten years, the rent was behind, the fine was not paid, C. enters not into the stable, nor B. attorns.

Resolved, that where the verdict was entred three terms past, and in the roll, the demise to B. for six years was not entred to be by indenture, that the roll shall be mended, because the note of the speciall verdict, which the jury exhibited to the court, remaining with the secondary, purports that the jury found the demise *prout*; by which it doth appear to the court that the demise was shewn in evidence, and reference made by the note to it; and so 'twas in *Gomersalls Case*.

Resolved, though the condition is of two parts in the dis-junctive, for non-payment of rent, or of the summe in gross, yet if A. had redemised any part of the house to C. and C. enters, by which the rent is suspended, that all the condition as well for the collaterall summe, as for the rent is also suspended, because the condition is intire, and cannot be divided by the act of the parties. Resolved, that if A. had redemised any part to C. though C. never enters, the rent is suspended, and though a stranger occupy it.

Resolved, that the lease by A. to B. for six years, though he had nothing at the time, was good by conclusion by the indenture, and when C. redemised all to A. then was the interest bound with this conclusion, then when A. redemises to C. the stable, C. is also concluded, for all parties or privies in estate or interest are bound by the estoppell, then the case is no other, but that A. demises for six years the stable to B. and after demises to C. for twenty years, (which is a good lease in reversion for fourteen years,) this is no suspension of the rent or condition, for 'tis no grant of the reversion, but a future in-

terest in reversion, no term, but an interest of a term, as the pleading is, and notwithstanding such grant, the reversion is in the grantor without attornment, and he shall have the rent upon the first lease, but if there be an attornment the reversion passes, and suspension will follow. And therefore 'twas agreed, if a man leases for twenty one years rendring rent, and a re-entry, the lessee leases to the lessor for six years to commence two years after, the rent is arrear, and by this he shall defeat the future interest vested in him.

Resolved, that this estoppell being found by verdict, the court ought to judge upon all the speciall matter, according to law, and because they are sworne *ad veritatem dicendam*, they did well to find the truth of the case, and leave it to the court; by *Wray*, Chief Justice, in *Pledals Case*, the jury was attainted for not finding such a lease by conclusion, intending that they (being sworn *ad veritatem dicendam*.) were not bound to find it; for the court held that the interest of the land, as to the parties and privies, was bound, and no conclusion shall be by such indenture after the term ended, by *Wray*.

Resolved, if lessee for twenty years leases for two years rendring rent, and grants all his term and interest, if the lessee atturns, the reversion passes, and if no attornment be, yet the interest in the reversion passes, for the grant of a man shall not be adjudged void, if to any intent it may take effect.

Resolved, if lessee for twenty years of a house, leases part for two years, and after leases to another all for ten years, rendring rent, so that it inures as a lease in reversion for part, that the rent shall issue out of all, and of the interest of the term, though it be not any estate that may be surrendered, and though it be conjoynd with the land in possession.

Error was brought upon this judgment, and this error assigned, for that R. the plaintiff was an infant and was admitted by his gardian, and no record made of it, as 'tis used *in banco*, but only recited in the court, *J. R. per A. B. gardianum suum, (ad hoc per curiam specialiter admissum,) queritur*, which was disallowed by all the justices, upon search and view of many presidents, which make a law in this court, yet some presidents were as *in banco*.

Note, (*reader*,) according to the opinion of *Wray*, 'twas

resolved in *Londons Case*, that if a man takes a lease by indenture of his own land, this is an estoppel but during the term, and then both parts of the indenture belong to the lessor.

Warden and Commonalty of Sadlers Case, 30 of the Queen,
fo. 54.

BY *mandamus* 'twas found before B. mayor of London, escheator of the city, and the inquisition was returned in chancery, that T. C. held of the king, &c. and died seised without heir, the wardens, &c. shewed their right that R. M. was seised in fee, and devised to them in fee, and that they were seised till by C. disseised, and shew the custome of London, that a citizen and freeman may devise in mortmain, and averred that R. M. was, &c. *tempore mortis*; and upon this, great question was whether a *monstrans de droit* lyes: or ought to be by petition. See the case at large for this learning, *Bereblock and Redes Case* was cited to be adjudged, if A. be bound in a recognizance, statute, &c. and after a recovery in debt was had against him, and he dyes, his executors ought first to pay the debt upon the recovery, though it be puny to the statute, &c. for though both be records, yet the judgement in the court upon judiciall and ordinary proceeding is more notorious and conspicuous, and of more high and eminent degree than a statute, &c. taken in private by the consent of parties.

Forse and Hemblings Case, 30 & 31 Eliz. in com.
banc. fo. 60.

ALICE ALLEN seised of certain messuages in fee maketh her will in writing, and thereby demiseth, that if *James Amynd* doth survive her, that then she doth demise and bequeatheth the same messuage to him and his heirs. And afterwards the said *Alice* did intermarry with the said *James*, and during her coverture, she said often the said *James* should never have the said messuage by her said will; *Alice* dyed without issue, and *James* survived, and the question was, whether the will was countermanded by the said marriage, or not; and if not, whether by

the words of revocation after the marriage was a countermand, and it was adjudged upon great deliberation, that the taking of a husband, and the coverture at the time of her death, was a countermand of the will. For the making of a will is but an inception thereof, and it doth not take any effect untill the death of the devisor. For, *omne testamentum morte consummatum, & voluntas est ambulatoria usque extremum vitæ exitum*. And it should be against the nature of a will to be so absolute that he that made the same, being of sane memory, may not countermand the same. And therefore the taking of her husband, being her own proper act, doth amount to a countermand in law: also 'twas said, that after marriage all the will of the wife, in judgement of law, is subject to the will of her husband, and a feme covert hath no wills, and therefore the countermand after marriage was of no force, *quod fuit concessum per tot. cur.*

Harlakendens Case, 31 Eliz. in banco regis, fo. 62.

THE Earl of Oxford leased to A., B. and C. (except the trees) for 21 years, C. assigned to D. the earl sells the trees to A., B. and D. they leased to E. and after sell the trees, the vendee cuts them, the lessee brings trespass. When a man maketh a lease for life or years, the lessee hath but only a speciall interest or property in the trees being timber, as things annexed to the land, but if the lessee or another severs them, the property and interest of the lessee is determined, and the lessor may take them as things which were parcell of his inheritance.

It was also resolved, that this clause (without impeachment of waste) doth not give to the tenant for life any greater interest in the tree than he had by the demise of the land, but only that it will serve that he shall not be impeached in any action of wast, or to recover damages, or the place wasted.

This is adjudged otherwise by all the judges of England in Lewes Howels Case in the 11 Report. *It was also resolved, that if an house

fall by tempest or other act of God, the lessee for life or years hath a speciall interest to take timber to reedifie the same, if he will. But if the lessee suffer the house to fall, or take it down, the lessor may take his timber as

parcell of his inheritance, and the interest of the lessee is determined and he may have waste, and treble damages.

Resolved, that the lessee by the grant had an absolute property in the trees, so that by the lease of the land, they did not passe, and he hath not equall ownership in both, and it should be a prejudice to him if they should be joined to the land, for then he could not cut during the term without waste, and after he shall not have them, and the lessor shall not have them against his own act. And here A., B. and D. were tenants in common of the land, and joyn tenants of the trees, and so their interest of severall qualities, and therefore cannot be an union betwixt them, but upon a feoffment, if the feoffor accept the trees, they are in property divided, though, *in facto*, they remain annexed to the land, for it is not felony to cut them, &c. and if the feoffor grant them to the feoffee, they are re-united in property as well as *de facto*, and the heir shall have them, not the executors, for the feoffee hath an absolute ownership in both, and it is more benefit to him that they are re-united.

It was resolved, that if timber trees be blown down with the wind, the lessor shall have them, for they are parcell of his inheritance, and not the tenants for life, or years, but if they be dotards without any timber in them, the tenant shall have them.

It was adjudged, that waste may be committed in glasse in the windows, for it is parcell of the house, and descends as parcell of the inheritance to the heir, and the executors shall not have them, although the lessee put the glasse in the windowes at his own cost, and if he take them away, he shall be punished in waste. And 42 *Eliz. in com. banco*, it was resolved, that wainscot, whether it be annexed to the house by the lessor, or the lessee, is parcel of the house, and there is no difference in law, whether it be fixed with great nails or little nails, or screws or irons put through the walls, for if it be fixed by any waies or means to the house or posts, or walls thereof, the lessee may not remove it, but he is punishable in an action of waste. For it is parcell of the house, and by lease or grant of the house in the same mannor, (as sealing or plaistering,) it shall pass as parcell thereof.

Fulwoods Case, 33 of the Queen, fo. 64.

C. acknowledged a recognizance of 250 *li.* to the Chamberlaine of *London*, and his successors, after acknowledges a statute of 200 *li.* before the Recorder of *London*, and maior of the staple to A. after A. sues execution by *liberate*, but it doth not appear that it was ever return'd, after the successors of the chamberlain sue execution, by precept to the serjeant of the mase in nature of an *elegit*, and hath a moyity, C. dyes, his wife recovers dower, and hath her house assigned for her third part, she dies, the chamberlain assigns to *Fulwood*, after A. assigns also to F. after the heir of C. demises to B. &c.

Resolved, that the successors of the chamberlain shall have this recognizance, though a body sole; for that the corporation was by custome to divers purposes, for orphanage, for the recognizance was acknowledged for orphanage money, and the same custome inables the successors to take such an obligation, &c. otherwise of a bishop, parson, &c. and that the execution by the serjeant of the mase was good, notwithstanding the statute of *W. 2. ca. 18.* which saith, *vic' liberet ei medietatem*, &c. By reasonable extent, to wit, by inquisition of honest men, and the sheriff is sworn, and the serjeant is not sworn to take the jury, &c. for the statute extends to every other immediate officer, to any court of the king of record, &c. Resolved, that execution of the *elegit* was good enough, without suing a *scire facias* against A. being in by matter of record; but 'twas said, if the sheriff had returned the former execution, he ought to have a *scire facias*; by the court, if the sheriff makes execution, 'tis good.

Resolved, that the verdict was good, which finds that C. acknowledged a recognizance before the maior, though not said *secundum formam statuti*, nor *per scriptum suum obligatorium*, for being the trover of lay people, it shall be intended according to the statute. Resolved, that the conusee cannot have aide of the statute of *32 H. 8. ca. 5.* for which see the book at large.

Resolved, that if a man be bound in two statutes, and the latter statute be first extended, and delivered in execution for a longer time, and a greater sum than the first was, yet when the first statute is satisfied, and his interest

lawfully determined, the second conusee shall have the land again, by force of the first extent. It was resolved *per tot. cur.* that the execution of a *liberate* is good, although the writ be not returned, and so of a *capias ad satisfaciendum*, and an *habere fac. seisinam*, and other writs of execution. And that the conusee should hold the land, not only untill he be satisfied for damages for detaining of the debt, and costs of sute, but also for his reasonable labours and expences, look to the words of the execution: and being in by matter of record, the conusor must bring his *scire facias*; but in case of an *elegit*, the conusor after satisfaction may enter, for there is no costs and damages, but the meer debt.

Hyndes Case, in com. banco, 33 Eliz. fo. 70.

WILLIAM HAWE, seised of certain lands by deed indented, demised the same to *Robert Gerard*, for 16 years, who assigned over to *Elizabeth Hynd*. *William Hawe* afterwards by bargain and sale in consideration of mony due, sold the reversion to one *Libb*, and before the same was inrolled, the said *William Hawe* levied a fine to *Libb*, and his heirs, &c. and after the levying of the fine the said indenture of bargain and sale was inrolled within six months, according to the form of the statute, and *Elizabeth Hynd* the tenant did not atturn. The question was, whether the conusee of the fine, after the said indenture inrolled, shall be in by the fine, and by the bargain and sale? for if he shall be adjudged to be in by the fine, no action of waste lyeth, for default of atturnment, and if he shall be in by the indenture inrolled, then there needeth no atturnment. And it was resolved, *per tot. cur.* that when *Hawe* by deed indented, did bargain and sell the reversion to *Libb* and his heirs, and before the inrollment levied a fine to *Libb* and his heirs, and after the deed is inrolled, (within six months,) that the conusee shall be in by the fine, and not by the deed inrolled, for the fee simple passeth by the fine to conusee and his heirs, and after the inrollment of the deed may not divest and turn the estate out of himself, which was absolutely established in him by the fine; for when the common law and the statute law concur, the common law shall be preferred. And it is true, that the inrollment shall have relation to the delivery of

the deed. But that is only to avoid estates, or charges made of the same thing by the bargainor to strangers, after the delivery of the deed, and before the inrollment, but not to divest any estate lawfully settled in the interim in the bargainee.

The records are so high and sacred that they import in themselves inviolable verity, which, if any man dare to gainsay, the law doth attribute so great honor to them, that they shall be tried only by themselves and not by the country, and if averment against a record should be permitted, then the effect and validity of the record should be tryed by the country, which is against the rule of the law, *nullum iniquum est in jure præsumendum*. Yet, resolved in this case, that the lessee shall be admitted to averr that the deed was inrolled after the fine, and not before, because it stands with the record, and doth not impugn any thing within the record, and great inconvenience would follow if such averment should not be admitted.

Boroughs Case, 38 Eliz. in banco regis, fo. 72.

RESOLVED, that the rent reserved upon a demise ought to be demanded, if the lessee will take advantage of a condition for non payment of the same, and the demand to be made at the place limited for the payment of the rent, although there be no words of demand in the demise, and although it be out of the land demised, but in the kings case it is otherwise. *Prærogativa regis*, for there the rent upon a re-entry reserved ought to be tendered; and in such case, the patentee of the king shall demand the rent upon the land.

Resolved, if the queen leases rendering rent, without limiting any place, or to whose hands the lessee may pay it at the exchequer, or to the bayliffs or receivers of the queen, and when she so appoints it by express words, 'tis no more than the law appointed, and though the words be (*ad receptum scacc'. apud Westm.*) it needs not that the receipt be holden at *Westminster*, the law would have implied that. And when a common person appoints to no place, the law appoints the payment upon the land.

Palmer's Case, 39 Eliz. in banco regis, fo. 74.

THE sheriff by vertue of a *fier. fac.* may sell a lease of the defendant, and in his writing the true commencement and term of the lease must be expressed, or else if he sell eth all the interest that the defendant hath in his lands, he needeth not to make any mention in the return, but generally *quod fieri fecit de bonis & catallis, &c.* But an inquisition found that the debtor of the king was possessed, *pro termino quorundam annorum, &c.* 'twas void, for a term cannot be extended without shewing the certainty of the commencement, for after the debt satisfied he is to have the remainder.

Resolved, for that the case at barre was an execution by *elegit*, which ought to be made by inquisition; the sale here was void, for the term was mistaken in the inquisition, and so mistaken was apprised by the inquisition, and the sheriff cannot sell any term but that only which was apprised by the jurors.

Hollands Case, 39 of the Queen, fo. 75.

RESOLVED, that before 21 H. 8. ca'. 13. if he which had a benefice with cure, accept another with cure, the first is void, but this was no avoydance by the common law, but by constitution of the pope, of which the patron might take notice if he would, and present, without deprivation; but because the avoidance accrued by the ecclesiasticall law, no lapse incurred without notice, as upon a deprivation, or resignation: so that the church was void for the benefit of the patron, not for his disadvantage; but now, if the first benefice be of the value of 8l. *per annum*, the patron at his peril ought to present, for to an avoydance by parliament every one is party, but if not of 8l. 'tis voyd by the ecclesiasticall law of which he needs not take notice. Resolved, that 21 H. 8. is such a generall act, of which the judges, *ex officio*, (though it be not pleaded,) ought to take notice. See the book at large upon this learning, what act shall be said a general act? Of which the judges are bound to take notice, what not.

*The Case of Corporations, 40 & 41 of the Queen,
fo. 77.*

RESOLVED, that where divers cities, &c. are incorporated by the name of mayor and commonalty, mayor and burgesses, &c. and in the charters 'tis prescribed that the mayors, bayliffs, &c. should be chosen by commonalty and burgesses, &c. which is as much as to say, as by all the burgesses, or all the commonalty; that yet the ancient and usuall election, by a certain selected number of the principall of the commonalty, &c. (commonly called the common councill,) and not by all of the commonalty, or so many of them as will come to the election, was good in law, and warranted by their charter; for, in every charter they have power given to them to make laws, ordinances, and constitutions, for the better government and ordering of their cities and boroughs; by force of which, and to avoid popular confusion, they, by their common assent, have instituted, &c. that the election shall be by such a select number. And though this ordinance cannot be now shewn, yet it shall be presumed that such ordinance and constitution was made at first.

Digbyes Case, 41 Eliz. fo. 78.

IT was adjudged, that when a man hath a benefice with cure, above 8*l.* and afterwards taketh another with cure, and is presented and instituted, and before induction procure the letters of dispensation, that this dispensation commeth too late, for by the institution, *ecclesia plena & consulta existit*, against all persons but the king, for every rectory consisteth upon spirituality, and temporality. And as to the spirituality, viz. *cura animarum*, he is compleat parson by the institution, for when the bishop upon examination had, admitteth him able, then he doth institute him, and saith, *instituo te ad tale beneficium, & habere curam animarum*, of such a parish, *& accipe curam tuam*, &c. vide 33 H. 6. 13. But touching the temporalities, as the glebe lands, &c. he hath no freehold in them until induction, for by the generall councill of La-

teran, Anno Dom. 1215. it appeareth, that by the acceptance of two benefices the first is void : *aperto jure*, for upon this councell are our books in this case founded. And 'twas resolved, that this was an exceptance of a benefice, *cum cura*, within the statute of 21 *H. 8.* Institution is an acceptance by our law, and 'twas lately adjudged, that if before induction, the *clerk* be inducted to another, the first is void by 21 *H. 8.* which saith (*accept and take another*) and for that now the avoidance is declared by 21 *H. 8.* he is bound to take notice, but till after induction, &c.

Nokes Case, 41 Eliz. fo. 80.

A MAN maketh a lease by these words, (*viz.*) demise, &c. grant, &c. and covenant that the lessee shall enjoy without eviction, by the lessor, or any claiming under him, and was bound to perform all covenants, &c. the lessee assigns his term, a stranger enters upon the assignee, and recovers in an *ej. firmæ*, after ouster the first lessee brings debt. This is a covenant in law, and the assignee shall have a writ of covenant. 9 *Eliz. 257. Dyer.* And if a man be bound by obligation to perform all covenants, grants, &c. this doth extend as well to covenants in law as to covenants in fact.

Resolved, though the recovery were by verdict, yet he ought to shew that the plaintiff in this recovery had an elder title, for otherwise the covenant in law is not broken. It was holden that an expresse covenant doth qualifie the generality of the covenant in law, and restraineth that by the mutuall consent of both parties, but a warranty in law, and an express warranty, the party may choose whether he will have, for this word *dedi* importeth a warranty.

Sir Andrew Corbets Case, 41 & 42 of the Queen, fo. 81.

A. devises land to B. &c. to have, &c. till 800l. shall be paid by them of the profits to marry his daughters, and dyes, the heir conceals the will, takes all the profits, and dies, the will is found by office, the devisee enters, and hath levied 640l. and employs it accordingly; whither the profits taken by the heir shall be parcell of the 800l. was the question.

Resolved, that the words (shall be leavyed) shall be construed (shall or might be leavyed,) and so 'twas holden of a lease, or limitation of a use; otherwise, he which is to leavy the summe, by deferring to do it, may exclude the reversioner for ever: see the book at large. Resolved, when the heir or reversioner, &c. enters, and expulses him to whom the land is limited, he hath election to recover the mesne profits, in an action, or re-entry, and retainer, till he levies the intire summe, and the other shall not have advantage of his own wrong, and if a stranger had entered, and occupied, the devisee ought to have taken notice at his perill, for *vigilantibus & non, &c.* and none is bound to give notice, but here the heir himself concealed the will, and the devisee had no remedy, for the mesne profits after the death of the heir, resolved, that a gardian shall not ouste tenant for life, nor years of the tenement.

Resolved, that admitting the gardian shall ouste tenant for years, yet he shall not hold over, because his term is certain in the commencement, continuance and end; otherwise of tenant by *elegit*, statute, &c. they shall hold over, because the term is uncertain.

Southcote Case, 43 Eliz. in banco regis, fo. 83.

IF A. do deliver goods to B. for to keep, the goods be purloyned away, yet B. shall be charged in a writ of detinue. For to keep, and to keep safely, is all one, but if B. do make them to keep as his own goods, he shall not be charged with them. And if A. do pledge or guage goods unto B. in this case B. shall not answer for them if they be purloyned, for he had some property in them, and not a custody only, but a ferry-man, a common in-keeper, or a carrier, which taketh hire, they ought to keep the goods safely, and they shall not be discharged if they be stoln or purloyned. But a factor, or a servant, (although they have wages,) doing his endeavour, shall not be charged.

Luttrells Case, 43 Eliz. banco regis, fo. 86.

IF a man have estovers, either by grant or prescription to his house, although he alter the roomes, and chambers in his house, it seemeth that the alteration of the qualities, so as it be not of the house it self, and without making new chimneys, by which no prejudice accreus to the owners of the wood, is not any destruction of the prescription, and though he make new chimneys, or make a new addition to his old house, he shall not lose the prescription thereby, but he may imploy or spend any of his new estovers in the chimneys, or in that part newly added. It was also resolved, that if a house or miln do fall, or be taken down by the act of the owner, or by wrong of another, yet for that the perdurable parts which includes all, doth remain, which is the land, whereupon the fabrick is built, he may re-edifie the same again without any losse of his appendant or appurtenant, but it ought to be upon the same place which was the foundation of the old house, for as it did support, and judgement of law included the ancient house when it was standing, so it imports and includes the new house, so as it is in a manner a continuance of the ancient house.

Divers tenants do hold of another, as of this mannor

by fealty and sute to the lords miln, the lord doth alien his miln with the sute of his tenants, and after the vendor dieth, and his sonne entereth and buildeth a new miln upon the other parts of his demean, he shall have the sute to his own miln, which the vendee had before, for the sute belongeth to him that hath the mannor, for no man may have sute to his miln, by reason of a tenure, if it be not of corn growing upon the lands, within the seigniorie or mannor, and the lord may erect a new miln within any part of the mannor, and the tenure is due to the same, and not to any particular miln.

Druries Case, 43 Eliz. Error in banco regis, fo. 89.

A COUNTESS being a widdow reteineth three chaplains, he who is last retained, is not capable of a dispensation, for the statute of 21 H. 8. c. 13. is executed by retaining of two, and the retaining of the third shall not divest the capacity which was in the first two, but if the retainer had been at one time, he who is first promoted, shall be first preferred, because in *aquali jure*, &c. 2. Resolved, if the two first die, the third is not capable of a dispensation without a new reteiner, because he was retained at the common law, and not according to the statute, *quod ab initio non valet*, &c. as if the son and heir of a baron reteineth a chaplain, and giveth him letters under his seal, and after the father dieth. And it was said, that the said act shall be taken strictly; as if a baron be made guardian of the five parts, he shall retein no more chaplains than before, and if a baron retein two chaplains who are promoted, he cannot discharge them, and retein others, during their lives.

Slades Case, 44 Eliz. fo. 92.

IT was resolved, that every contract executory imports in it self an assumpsit. For when one doth agree to pay money, or to deliver any thing, by that he doth assume, or promise to pay or to deliver the things, and therefore when he selleth any goods to another, and agreeth to deliver them at a day to come, and the other in consideration thereof agreeth to pay so much money, at such a day; in this case both parties may have an action of debt, or action upon the case, upon the assumpsit, for the mutuall executory agreement of both partya, import in themselves as well a reciprocall action upon the case, as an action of debt; and a recovery or barre in an action of debt, is a good bar in an action upon the case, brought upon the same contract, and so likewise in an action upon the case, a recovery, or barre in the same, is a good plea in an action of debt, upon the same contract.

The defendant in an action of the case upon the assumpsit may not wage his law, as one may de in an action of debt.

If a summe of money be promised in marriage to be paid at several daies, an action upon the assumpsit lyeth for non payment of the first, although no action of debt lyeth, untill all the daies be past, *multitudo errantium non parit errori patrocinium*, and if the debtor of the king sueth by *quo minus*, in the exchequer, the defendant shall not have this law for the benefit of the king.

Adams and Lamberts Case, 44 & 45 Eliz. in banco regis, in ejectione firmæ, fo. 104.

UPON consideration of the statute of 1 E. 6. cap. 14. it was resolved;

1. That if one demise to any of his kindred, to superstitious uses, although he limit them to pay certain sums of money to the said uses, yet these lands are given to the king, for it shall not be intended to be upon other consideration but that which they at that time conceived to be the service of God, which is the most worthy consideration, & the reason wherfore the demise was made

to his friends was, because he imposed more trust in them than others, therefore the persons shall not be regarded.

2. A demise of an estate for life, or in tail, is within the statute by equity, although that the statute saith *to have continuance for ever*, for the intent of the statute was to toll such uses, and regardeth not the time of their continuance.

2. An estate taile may continue for ever, and so was the intent of the devisor, in this case, that the uses should continue for ever, for he limits his heir to do it. 3. Without this construction the statute should be defrauded.

3. The statute giveth to the king lands given for the finding of a priest, and giving of lands upon condition to find a priest is within the statute, for this is more compulsory than the other.

4. All the lands is given to the king, but not by the first branch, for that extends only to lawfull chanteries, or those who have countenance, of lawfull commencement, but not to such who are without any colour of lawfull commencement: as if they were founded by license of the pope, his chantry is without colour of lawfull commencement or foundation: also if lands be given to the finding of a chantery without corporation, this is out of the said branch. Neither by the second branch, for that giveth the lands belonging to such colleges to the king, without which he shall only have the scites; but by the third branch, for this extends to finding of a priest without corporation. But, 'twas objected, that the land was not given to the finding of a priest, for he had but a pension out of it, and the statute is, that the king shall have in as large, &c. as the priest had it. 2. Here is a good use limited, six pence by the week to six poor men, and although it be *ad orandum*, &c. this is not within, for it is out of the statute, except that orisons be to be performed in publique. For answer to these: these differences were taken; 1. If one give 20*l. per annum*, for the finding of a priest, and limit to the priest 10*li. per annum* all is given to the king, for the residue shall be intended for the finding of necessaries: otherwise it is, if a condition be annexed to the gift, to give 10*l. per annum* to a priest, there the king shall have but 10*l.*

2. Land of 20*l. per annum* is given to find a priest, with 10*l.* thereof, and that the other tenne bound shall be to

the poor, the king shall have but tenne pound, but if it be for finding a priest, and maintenance of poor men, without limiting how much the priest shall have, the king shall have the land, for otherwise he shall have nothing; 3. If land of 20l. is given for finding salary for a priest with 10l. of it, and also a good use is limited, there the king shall have but ten pound, although the other necessities are to be bound for the priest, because a good use in certain shall be preferred before a superstitious incertain use; but if nothing in certain be limited to the priest, the king shall have the land; 4. If land be given to find a priest; the king shall have it, but if a priest have but a stipend, the king shall have but the stipend; 5. When a certain sum is limited to a priest, and other good uses are also limited, which depend upon the superstitious use, all is given to the king; 6. If all the uses be superstitious, of what certainty soever they are, the land is given to the king, otherwise it is, if there be any good use, and as to that which was objected, that the king shall have no more than the priest, it was answered that that extends to the 1, 2. and 4 branches, and not to the third, for otherwise the king should never have the land it self, for this was never used to be limited to the priest himself.

And although that these orisons are to be made out of any church, yet it is within the statute, for the words, church or chapell, extend to lamps and lights and not to prayers; 2. The statute speaks of anniversary, &c. or other like thing, and this is a like thing, but in the case at bar, if he had said that his friends should have the residue of the profits of the land, this had saved the land.

Actons Case, 45 Eliz. com. banco in a quare impedit, fo. 117.

A NOBLE woman reteineth a chaplain, who purchaseth a dispensation, she taketh a husband, the chaplain is promoted to another benefice than that which he had before the reteiner, his first benefice is not void.

It was objected that the statute speaks of duches, &c. being widdows or married under the degree of a baron, and for that, when she marrieth above the degree she is out of the statute, and 'tis not sufficient that she is within

the statute at the time of the retein, but she ought to be so also at the time of the promotion.

It was answered, that all which the statute requires at the time of the retein is, that she be a noble woman, married under the degree of a baron, or a widdow, and to be noble at the time of the promotion; therefore a noble woman married above the degree, cannot retein, or if at the time of that promotion she be not able, as if her earl be attainted, and although the baron and feme have but one body, yet they have two souls, wherefore it is not inconvenient that they should have severall chaplains, and the reason for which the said provision was made for a noble woman who marrieth an ignoble husband, was not to exclude those who married nobles, but because such femes are in law ignoble, (except they be noble by descent,) and without such provision shall be out of the statute: baron reteineth a chaplain and dieth, the chaplain may retein both the benefices, but he shall be punished for non-residency, without suing a non obstante.

Dumpore Case, 45 Eliz. banco regis, in trespas, fo. 119.

A MAN maketh a lease, provided that the lessee or his assigns shall not alien the premises without speciall license of the lessor, &c. The lessor giveth license to the lessee to alien the same or any part thereof, &c. in this case the lessee may alien and his assigns, *ad infinitum*, without any more license, and the proviso is determined.

The Lord *Stafford* made a lease to three persons, upon condition that they, nor any of them should alien, without the consent of the lessor, and after one of them did alien with his consent, and after the other two did alien without license, and it was adjudged 28 *Eliz.* that in this case, the condition being determined, as to one person, by the license of the lessor, it was determined in all, for when the lessee alieneth any part of the residue, the lessor may not enter into any part aliened with license, & therefore the condition being determined in part, is determined in all, for the condition being intire, may not be apportioned, and 16 *Eliz. Dyer. 334. fuit deny per Popham, Chief Justice. Vide Lit. 80. b. § 4 & 5 Ph. and M. Dyer, 152.*

Bustards Case, 1 Jac. fo. 121.

IN every lawfull exchange of land, this word *exambium* imports in it self *tacite*, a condition and a warranty, and the other a voucher and recompence, and in all respects of reciprocal consideration, th'one land being given in exchange for the other, but that is a special warranty, for upon the voucher he shall not recover other lands in value, but those only which were given in exchange, and this warranty follows only in privity, for none may vouch by force thereof, but the parties to the exchange, and their heirs and no assigns.

If A. give in exchange three acres of land to B. for other three acres, and after one acre is evicted from B. in this case all the exchange is defeated, and B. may enter into all his lands.

Beverleys Case, de non compos mentis in banco regis,
1 Jac. fo. 123.

EVERY act that a man *de non compos mentis* doth either concerns his lands, life, or goods, either done in court of record, or out of court of record, all acts that he doth in any court of record, either concerning his lands or goods, shall bind himself and all other for ever, and those acts which he doth out of the court of record, shall bind himself during life, and in some cases shall bind all others for ever, so as the party himself shall not be admitted to stultifie himself or disable himself, but an ideot *à nativitate* may not make feoffment, gift, lease or release, but it may be avoided during his life by office at the king's sute, which shall have relation, *a tempore nativitatis* to avoid all acts done by him, and after his death the king shall deliver his lands *rectis hæredibus*, four manner of men, *de non compos mentis*; 1. An ideot or fool naturally; 2. One which was of good and perfect memory, and by the visitation of God hath lost the same; 3. *Lunaticus, qui gaudet lucidis intervallis*, who sometimes is of good & perfect memory, and some other times *non compos mentis*; 4. He that is so by his own act as a drunkard.

All acts which a lunatick during the time of his lunacy

doth, & all acts which a mad man doth, who once was of perfect memory, and by the act of God hath lost his understanding, are equivalent to the act done by an idiot, but the act which a man doth *qui gaudet lucidis intervallis*, at such times as he is of good and perfect memory, shall bind him, and are good. And a drunkard who for the time of his drunkenness is *non compos mentis*, yet his drunkenness shall not extenuate his act or offence, but doth aggravate his offence, and doth not derogate from the act which he doth during the time of his drunkenness, and that as well touching his life, lands and goods, as any other thing that concerns him. The king shall have the custody of the lands, goods, chattels, &c. of one *non compos mentis*, to the use of him, his wife, children and family, a man *non compos mentis* shall not lose his life for felony, or murder, for no felony or murder can be committed without a felonious intent and purpose, and he is deprived of reason, understanding and intentions, *dicta est fellonia quia fieri debet felleo animo, & furiosus non intelligit quid agit, & animo & ratione caret, & non multum distat a brutis*, as Bracton saith, and *stultus dicitur a stupore*.

THE FIFTH BOOK.

Claytons Case, 27 & 28 Eliz. in banco regis, fo. 1.

AN indenture of demise dated 26 May, 25 Eliz. to hold for three years from henceforth, it was delivered at four a clock in the afternoon of the 20th of June after; the question was when the lease should begin, from henceforth shall be taken the day of the delivery *inclusive, id est*, from the making or delivery.

Traditio loci facit cartam, this lease must end the nineteenth of June, in the third year after. The day of the delivery is parcell of the term, but *a die confectionis*, or *die datus*, the term beginneth the day after the date, from the date, and from the day of the date is all one, because that in judgment of law the day includes all the day of the date, &c.

Elmers Case, 30 Eliz. banco regis, fo. 2.

1. RESOLVED, that the statute of 1 El. is a private act, whereof the court shall not take notice without pleading of it; 2. Whereas the bishop ousted his lessee for years, and made a lease for three lives, this is voidable by the successor; for, first, the statute giveth him power to make a lease for twenty one years, or three lives, and therefore cannot make both; 3. Lessee for lives shall have the rent reserved upon the lease for years, and shall not pay rent to the bishop, untill the term determined, and so hospitality will decay in the mean time, and where 32 H. 8. ca. 8. provided that the old lease be surrendered before the making of a new, illusory surrender upon condition is not within the act, but judgment given against the plaintiff for not pleading of the said act of 1 Eliz.

Jewels Case, 30 Eliz. banco regis, fo. 3.

LEASE of a fair reserving rent, is not within the statute of 1 *Eliz.* for although the rent be due by reason of the contract, yet it is not incident to the reversion, and 'tis also without remedy by assise or distress.

Lord Mountjoyes Case, 31 & 32 Eliz. banco regis, fo. 4.

TENANT in taylor according to the statute, with power to make leases, &c. reserving the ancient rent, maketh a lease of two distinct farms, reserving the ancient rents in one summe, out of both the farms, this is a new rent, and not the accustomed rent, and if he reserve a lesser rent (during his life, and after his death) then the ancient rent, the lease is not good.

If tenant in taylor be seised of three acres of land, every one of them of equal annuall value, and all have been demised for three shillings *per annum*, in this case he may not demise one of them for 12*d.* *per annum*, or two of them for two shillings *per annum*, and so *pro rata*.

Justice Windhams Case, 31 & 32 Eliz. banco regis, in a writ of error, fo. 7.

A MAN leaseth S. for ten years, and C. for twenty years, and both to another for forty years after the end of the said severall demises, ten years expire, the last lessee enters into S. and upon ouster brings trespass and recovereth, for the joint words of the parties shall be taken *respective*, and the leases shall commence severally upon the severall determination of the said leases. Joint words shall be taken severally; 1. In respect of the severall interest of the grantors, as if two tenants in common grant a rent-charge; 2. In respect of the severall interest of the grantees, as a joint warranty to two severall tenants; 3. In respect that the grant cannot commence at one time, as a remainder limited to the right heirs of I. S. and I. N.; 4. In respect of the incapacity of the grantees to

take jointly; 5. *Ratione subjectæ materiæ*, as rent granted to two copartners for equality of partition; 6. *Ne res destruat, & ut evitetur absurdum*, as in *cessavit*, the tenure is alleged by homage, fealty and rent, and *quod in faciendo servitia prædicta cessavit*, and it shall be construed to such services only as of which a man may cease.

Brudenels Case, 34 Eliz. banco regis, fo. 9.

IF a lease be made to A. during the life of B. and C. without saying during the life of the survivor of them, if one of them dye, yet the estate is not determined. But A. shall have the land during the life of the survivor; for if a man make a lease of land to two persons, during their lives, they assign over their estate, now the assignee hath estate for life of them too, and if one dye, he shall have the land during the life of the survivor. Note, two diversities, th'one a limitation in this case aforesaid, the other a condition, for if a man demise land for 100 years, if A. and B. live so long, in this case, if th'one of them dye, the lease is determined, for the lease is conditionall, and not determinable by limitation of estate, and the life of a man is collaterall to the lease which is but only a chattel. If an administrator have judgment and dye, his executors cannot sue execution of that judgement, but he that shall be subject to the payment of the debts of the first intestate, and that are not the executors of the administrator. *Vide 26 H. 8. fo. 7.*

Hensteads Case, 36 & 37 Eliz. com. banco, fo. 10.

A FEME, lessor or lessee at will, taketh a husband, the will is not determined, for it may be prejudiciall to the husband to have it determined: So if one of the lessees or lessors at will dye, but in case where one of the joynt lessees at will dyeth, nothing surviveth but the others shall pay all the rent.

Ives Case, 39 & 40 Eliz. com. banco, fo. 11.

I. leaseth a mannor to S. for thirty years, excepting wood and underwood growing upon it, and after leased to him the wood for 62 years, without impeachment of waste, and leaseth to him the mannor for thirty years, after expiration of the first thirty years, thirty years expire, S. make waste, I. bringeth an action of waste; 1. Resolved, by the exception of wood, and underwood, the soyle is excepted and the woods growing, &c. are of abundance; 2. The wood remains parcel of the mannor, because the lessor had the intire freehold, otherwise if he had leased for life with such an exception, so if one lease a mannor excepting the advowson for life, the advowson is in grosse for life, but if he grant the advowson for life, it remains appendant; 3. By the acceptance of the third lease, the said lease of the wood for 62 years was presently surrendered, because the lessee hath affirmed the lessor to be able to lease.

Saunders Case, fo. 12. 41 Eliz. com. banco, in an action of waste.

IF a man have land, in part wherof there is a colmine appearing, and he demise the land to another for life or years, the lessee may digge for cole, &c. And the reason is, for that the mine is open at the time of the demise, &c. and when he demiseth all his lands, it shall be intended, that his meaning was that all the profit of the land should passe, &c. but if the myne be not open, but within the bowels of the earth, at the time of the demise, 'tis otherwise.

Also if a man have in his lands hidden or unknown mynes, and lease the same lands and all mynes therein, the lessee may dig for them.

Rosses Case, 40 & 41 Eliz. fo. 13.

A LEASE is made to A. and his assigns, for his life and the life of B. and C. this is a lease for three lives, and the survivor of them.

Countesse de Salops Case, fo. 14. 42 & 43 Eliz. banco regis.

SHE brought an action of the case against *Crompton*, and declared that she demised to him a house at will, *et quod ille tam negligenter & improvide custodivit ignem suum quod domus illa combusta fuit*, the defendant pleaded *non culp.* and it was found not guilty. And 'twas adjudged, that for the permissive waste no action lyeth against the opinion of *Brook*, in title waste, 52. & the reason of the judgment was, for that at the common law no remedy lyeth for waste, either voluntary or permissive, against the lessee for life or years, because the lessee hath interest in the land by the act of the lessor, and it was his folly to make such a lease, and not to restrain him by covenant, condition, &c. And by the same reason tenant at will shall not be punished for permissive waste; but if tenant at will commit voluntary waste, as pulling down of houses cutting of trees, a general action of trespass lyeth against him, for that these do amount to the determination of the will, without the entry of the lessor: but it was agreed, that in some cases where there is confidence put in the party, an action of the case lyeth for negligence, although the defendant cometh to the possession by the act of the plaintiff, as 12 E. 4. 13. If one do commit his horse to one to keep safely, the defendant *equum illum tam negligenter custodivit quod ob defectum bonæ custodiæ iteriit*, an action upon the case lyeth for this breach of trust, also 2 H. 7. 11. If my shepherd which I trust with my sheep, and by his negligence they be drowned or otherwise perish, an action upon the case lyeth against him; but in this case at the barre, there was a demise at will made to the defendant, and no confidence reposed in him; wherefore it was ordered, that the plaintiff should not recover by her bill.

CASE OF ECCLESIASTICALL PERSONS.

43 & 44 Eliz. fo. 14. in the high court of parliament.

AT a parliament holden in this Michaelmas term it was resolved by the two Chief Justices, *Popham* and *Anderson*, and divers other justices assistants, to the lords of the parliament, in the upper-house, that leases made to the queen, by colleges, deans, and chapters, or any other, having spirituall or ecclesiasticall livings, against the provision of the act, 13 *Eliz. ca.* 10. are restrained by the same act, as well as leases made to common persons, for they are disabled by parliament to make estates, the king being the head of the commonwealth may not be an instrument to defeat the provision of an act of parliament made *pro bono publico*. For though the queen, by the common law had ability to take it, yet in so much the parliament had disabled them to make states, estates made to the queen against the act are void.

COVENANTS, &c. CONCERNING LEASES, ASSURANCES, &c.

Spencers Case, 25 *Eliz. banco regis*, fo. 16.

A LESSEE doth covenant for himself, his executors, and administrators, with the lessor, that he, his executors or assigns shall build a brick wall upon parcell of the land demised, &c. afterwards the lessee assigns over his term to B. in this case B. is not bound to build the wall.

When the covenant extends to a thing *in esse*, parcel of the demise, then the thing to be done by force of the covenant, is *quodammodo* annexed and appurtenant to the thing demised, and shall run with the land, and bind the assignee, although he be not bound by expresse covenant. But when the covenant extends to a thing which had not essence at the time of the demise made, that cannot be appurtenant, or annexed to a thing which had not essence. As if a lessee covenant to repair the houses to him demised during the term, this is parcell of the contract, &c. and shall bind the assignee, although he be not bound expressly by the covenant. But in this case, the covenant concerns a thing which had not essence at the time of the demise, but to be made after, and therefore it shall bind

the covenantor, his executors and administrators, and not the assignee, for the lord will not annex the covenant to a thing which had not essence. It was resolved in this case if the lessee had covenanted for him and his assigns, &c. that in as much as it was to be builded upon the thing demised, it should bind the assignee, by expresse words. Also, if a warranty be to one, his heirs and assigns, by expresse words, the assignee shall take benefit thereof, and have a *warrantia carta*.

But although the covenant be for him and his assignees, yet if the thing to be done be meerly collateral to the thing demised, and do not concern the same, the assignee shall not be charged; as if the lessee covenant for him and his assigns to build a house upon the land of the lessor, which is not parcell of the demise, or to pay any collateral summe of money to the lessor, or to a stranger, this shall not bind the assignee. Also in a case of goods, as sheep, cattell, &c. there is not any privity or reversion in the assignee, but meerly a thing in action in the personalty, which cannot bind any but the covenantor, his executors or administrators which do represent him. The same law is, if a man demise lands for years, with a stock of cattell, or summe of mony, rendring rent, and the lessee covenants for him, his executors, administrators, and assigns, to deliver the stock of cattell, or the summe of mony, at the end of the term, yet the assignee shall not be charged with the covenant.

This word (*concessi*) or (*demisi*) imports a covenant, and if an assignee of a lessee be evicted, he may have a writ of covenant, so shall tenant by statute, or *elegit* of a term, or he to whom the lease is sold by force of any execution, &c.

If a man grant to a lessee for years, that he shall have so many estovers as shall serve to repair his house, or that he shall burn within his house, or such like during the term, that is appurtenant to the land, and shall run with the same as a thing appurtenant, in whose hands soever the same commeth.

Assignee of an assignee, executors of an assignee, *AS-SIGNES* of executors, or administrators of every assignee, may have action of covenant, for all are comprised within this word, (assignees,) for the same right that was in the testator, or intestate, shall go to the executors or administrators. It was resolved, that the act of 32 H. 8. c. 24. extendeth only to covenants which touch the thing demised, and not to collateral covenants.

*Slingsbyes Case, 29 & 30 Eliz. fo. 19. upon error, in the
exchequer chamber.*

IF any party covenantor in a tripartite indenture break covenant, all the rest of the parties, covenantees, are to maintain the action, notwithstanding the words of the covenant are *et ad et cum quolibet eorum*. But if a man demise to A. black acre, to B. white acre, to C. green acre, and covenant with them, and every of them, in this case, in respect of the severall interest by these words, *and every of them*, the covenant is made severall, but if the demise be made to them jointly, then these words in the covenant (and every of them) are made void.

A man cannot bind himself to three, and to every of them, to make that joint and severall at the election of severall persons, for one self same cause; for the court will be in doubt for which of them to give judgment.

It was resolved, that an interest cannot be granted jointly and severally, if a man grant *proximam advocacionem*, or make a lease for term of years of land to two jointly and severally, these words severally are void, and they are jointenants; but a power and authority may be jointly and severally, as to make livery, or to sell, for they have no interest or action, but are as servants to others. And judgment was reversed.

Roswells Case, 35 Eliz. fo. 20.

BARGAINOR of land covenanteth to make to the bargainee such assurance as his counsell shall advise, the bargainee himself cannot devise it, although he be learned in the law, for then it would be no good plea to say *quod consilium non dedit advisamentum*.

Higginbottoms Case, 35 Eliz. banco regis, fo. 20.

A PARSON assumeth to I. S. to make him such an estate in a rectory as the counsel of the said I. S. shall devise, the counsell shall be given to I. S. and he shall notifie it to the parson.

Stiles Case, 38 Eliz. banco regis, fo. 21.

A CHARTER with the words *hæc indentura*, without a manuell act of indenting of the paper or parchment, is not an indenture.

Sir Anthony Maynes Case, 38 Eliz. fo. 21. error in banco regis.

SIR A. M. leaseth to S. for twenty one years, and bindeth himself to make a new lease unto him upon surrender of the old ; and leaseth to another for 80 years by fine, *Scott* the first lessee bringeth debt, and had judgement. If you be bound to enfeof one in the mannor of D. before such a feast, if you make a feoffment to another of this mannor, before the same feast, you have forfeited the obligation, although that you purchase the land again before the said feast, because that you were once disabled to make the feoffment.

If a man lease a mannor for years, and the lessee covenanteth to uphold the houses, and to leave the same mannor in as good an estate as he found it, and during the term, the lessee maketh wast in houses, and cutting of timber, &c. the lessor may have a writ of covenant before the end of the term, for cutting of the timber, for it was impossible that the covenant should be performed after, for the timber, but otherwise of the houses, *Fitz. Na. Br. fo. 145. K.* It was also resolved, that if a man seised of lands in fee covenant to infeoff I. S. upon request, and after he maketh a feoffment of the same to a stranger, in this case I. S. may have an action of covenant without request.

Laughters Case, 37 Eliz. fo. 22 banco regis.

WHERE a condition of an obligation consisteth upon two parts in the disjunctive, and both possible at the time of the obligation made, and after one of them becomes impossible by the act of God, the obligor is not bound to perform the other part, for the condition is made for the benefit of the obligor, and shall be taken most beneficiall for him, and he had an election either to perform the one or the other, for the saving of his obligation, but now, *impotentia excusat legem.*

Hallings Case, 38 Eliz. com. banco, fo. 23.

ONE covenanteth to make an estate in fee at the costs of the covenantee, the covenantor is to do the first act, *id est*, to notifie what assurance he will make, that the covenantee may know what sum to render.

Mathewsons Case, 39 Eliz. com. banco, fo. 23.

SEVERALL persons make severall covenants in one indenture, or writing, the seal of one of them is broken away, that shall not avoyd the covenant of the rest, but only the covenant of him whose seal is so debrused, or defaced, *Vide Piggots Case*, in the 11 report, because severall covenants, otherwise if joint.

Lambes Case, 41 Eliz. com. banco, fo. 24.

A. is bound unto B. to give unto B. such a release, &c. before the 22 day of October next, as by the judge of the prerogative court is thought fit. In this case A. must procure the judge to do it, or devise it, for the judge is a stranger to the condition, and the condition is for the benefit of the obligor, and he hath taken upon him to perform the same at his perill, but it is otherwise if the obligee or his counsel should devise it.

Broughtons Case, 42 & 43 Eliz. fo. 24. banco regis.

IN an action of debt by *Broughton*, plaintiff, against *Pretty*, upon an obligation, with condition, where the plaintiff was bound in an obligation of 200l. for the defendant, for the payment of 100l. to C. if therefore the defendant should save and keep harmless the said *Broughton* from all sutes, quarrells and demands, touching the said obligation, &c. that then the obligation to be void, &c. at the day of payment of the 100l. the plaintiff cometh to the place where the 100l. ought to be paid, and perceiving there not any person present to pay the 100l. for the defendant; *Broughton*, to save the penalty of the obligation, paid the mony to C. and brought his action upon the counter-bond, and it was adjudged that the plaintiff should recover; for the payment of the 100l. is damage and harm. And it is not necessary, whether the plaintiff was arrested or sued, &c. Terror of sute (so as he dare not go about his business) is damnification, although he be not arrested.

Dean and Chapter de Winsors Case, 43 & 44 Eliz. fo. 24. banco regis.

A MAN leased a house by indenture for years; the lessee covenants and grants for him and his executors with the lessor, to repair the house at all times necessary, the lessor assigns over, and the assignee suffereth the house to decay, the lessor brought an action of covenant against the assignee, and it was adjudged, *per Popham*, and all the court, that the action lyeth although the lessee had not covenanted for his assigns, because in respect thereof the rent is the less, which is, for the benefit of the assignee, *qui sentit commodum sentire debet & onus*. If a man grant one estovers to repair his house, this is appurtenant to the house. *Fitz. Nat. Br.* 181. 28 *H.* 8, 28.

Sir Thomas Palmers Case, 43 Eliz. fō. 25. banco regis.

SIR Thomas Palmer seised in fee of a great wood, did bargain and sell to one *Cornford*, and his assigns, 600 cords of wood, to be taken by assignment of Sir Thomas, *Cornford* assigns his interest to one *Basset*, and afterwards Sir Thomas sells to one *Maynard* such quantity of wood as will make 4,000 cords at election of the vendee; and afterwards Sir Thomas assigns to *Basset* 600 cords of wood, to be taken by him, who doth fell the same, and *Maynard* did take them away, and converted them, &c. an action upon the case was brought by *Basset*, and judgement was given for him, for *Cornford* had an interest which he might assign over, and not a thing in action, or a possibility, for it was resolved, if Sir Thomas did not assign them to *Cornford* upon request, *Cornford* might take them without assignment, for the grantor cannot, by his own act or default, either subvert or derogate from his own grant. Therefore it ensueth, that *Cornford* had an interest that he might assign over. If A. have a house and land, and reasonable estovers in the woods of another, by view and livery of the bayliff, &c. if A. take estovers without view or delivery, &c. he is a trespassor, although he take less than he ought to have by livery. But if A. demand his estovers, and the owner of the bayliff will not deliver to him, he may have an assize; 2. If the assignment were void, yet the defendant cannot take trees cut by another, but out of the residue of the wood.

The Countess of Rutlands Case, 2 Jac. fō. 26. banco regis.

EDWARD Earl of Rutland seised of the mannor of *Eyhering*, by indenture dated 10 March, anno 21 Eliz. for augmentation of the joynture of *Issabell* his countess, did covenant with Sir *Gilb. Gerrard*, and *Thomas Houlcroft*, his brother, that before the end of Trinity term then next following, he would assure by fine or other conveyance the said mannor to the said Sir *Gilb. Gerrard* and *Thomas* in fee, which fine or other conveyance should be to the use of the said earl and *Issabell* his wife, and the heirs of the said earl, which indenture was acknowledged

and inrolled in the chancery, the 28 of the same month of March, by another indenture between the said earl on the one part, and the Lord *Burgleigh* on the other part, and Sir *Gilb. Ger.* & others on the same part, for the advancement of the heirs males of the said earl, the earl did covenant, &c. to convey the said mannor amongst others to the said Lord *Burgleigh*, Sir *Gilb. Gerard* and others, or to any of them, before the feast of the annunciation of our lady next ensuing, which assurance should be to the use of the said Earl *Edward*, and the heirs males of his body, and for want of such issue, to the use of the heirs males of *Thomas Earl of Rutland*, with divers remainders over, and in the same indenture the said Earl *Edward* did covenant, &c. to stand seised to the uses contained in the second indenture. No fine or other assurance was leavyed or made by the said Earl *Edward*, before the end of Trinity term.

Afterwards, (*viz.*) 17 September next following, the said Earl *Edward* acknowledged a note of a fine of the said mannor of *Eckering*, only to Sir *Gilb. Gerard* and *Thomas Ho*: and the heirs of Sir *Gilb.* And the 18 day of the said month acknowledged another note of a fine of the said mannor of *Eckering*, amongst many other manors mentioned in the later indenture to the Lord *Burgleigh*, Sir *Gilb. Gerard*, and other parties to the later indenture, and both fines were entered in *Octabis Mich.* next after. And it was proved by divers testimonies, that the said Earl *Edward*, as well before the indentures, as after the fine leavyed, said, that the said countess should have the mannor of *Eckering*. And it was resolved, by *Popham*, Chief Justice, and all the court,

First, although the indenture being made for declaring of uses of a subsequent fine, recovery or other conveyance, to certain persons, and within a certain time, and to certain uses, yet they are only but directory, and do not bind the estate or interest of the land, yet if the fine, recovery or other assurance be pursued according to the indenture, there cannot be any averment made against the indenture taken in this case; that after making of the indentures, and before the assurance by mutual agreement of the parties, was concluded and agreed, that the assurance should be to other uses, but if other agreement or limitation of uses be made by writing, or other matter as of high, or higher nature, then the later agreement should stand, for every

contract or agreement ought to be dissolved by matter of as high nature as the first was. *Nil tam conveniens est naturali æquitati quam unumquodq. dissolvi eo ligamine quo ligatum est.*

Also it was very inconvenient that matters in writing should be controuled by averment of parties, to be proved by incertain testimony of slippery memory, and should be perillous to purchasers, farmers, &c.

2. It was resolved, that if the form of the indentures be not pursued, (as for quantity of land, the time within which the fine should be levied, &c.) averment without writing may be taken, that the fine, &c. was to other use than was contained in the indenture by reason of a new agreement subsequent, which in this case may be as well by word as writing.

3. It was resolved, that although the indentures be not pursued, in circumstance of time, quantity, person, &c. yet if no other mean new agreement be proved, the fine, &c. in judgment of law shall be to the use named in the indenture. The fines cannot be directed by both the indentures, although perhaps it was in the meaning of the parties, because the directions and declarations of the first indentures were controuled and frustrated by the said second indentures.

CASES OF EXECUTORS.

Russells Case, 26 Eliz. fo. 27. banco regis.

A RELEASE by an infant executor under the age of 21 years is no bar, but upon payment or satisfaction to an infant executor, he may acquire and discharge the debt for so much as he receiveth. All things that he doth according to the office and duty of an executor shall bind him; an executor may release before probate of testament, for although he may not have an action, yet the interest of the action is in law in him at the time of the release.

Middletons Case, 1 Jac. in com. banco, fo. 28.

IT was adjudged between *Middleton* and *Rymot*, that an executor before probate may release action, although that before the probate he may not have action, for the right of the action is in him : but if A. release, and after takes administration, that shall not bar him, for the right of the action was not in him at the time of the release. Two executors prove the testament, the third refuseth, yet he may release, *Littlel.* 117. if one be bound to pay a sum of money at a day to come, a release of actions before the day is a bar, and yet before the day he could have no action.

Harrisons Case, 40 Eliz. fo. 29. com. banco.

IT was adjudged, that a judgement upon debt due by obligation, shall be paid before a statute made for performance of covenants, which are things in contingency, and in future or other statutes or recognizances for debt. *Vide Sadlers Case*, in the fourth book, although the judgement be after the acknowledgement of the statute.

Piggots Case, 40 Eliz. com. banco, fo. 29.

ONE bringeth debt as administrator, *durante minore etate*, of one whom he averred to be within age, and he doth not say that he was within the age of 17 years, and the plaintiff was barred, because at that age the administration ceaseth.

Princes Case, 41 & 42 Eliz. com. banco, fo. 30.

AN infant is made executor, *administratione durante minori etate* may be committed to the mother or other friend of the infant, which shall cease and be void when the infant is at the age of 17 years, and this administrator may not sell any goods of the deceast, unless it be for necessity of payment of debts, for he hath his office of administrator, *pro bono & commodo infantis*, and not for his prejudice, also he cannot assent to pay legacies, unless there be assets to pay debts, &c. and if it be a woman under the age of 17 years, and take husband at full age, the administration ceaseth.

Where one hath goods spely in an inferior dioces, yet the metropolitan of that province, pretending that he had *bona notabilia*, in divers diocesses, committed the administration, &c. this administration is not void, but voidable by sentence, because the metropolitan hath jurisdiction in all places within his province, but if the ordinary of one diocess commit the administration of goods, when the party hath *bona notabilia* in divers diocess, this administration is meerly void, as well for his goods within the diocesse as without. *Vide Vere & Jeffrays Case, 22 Eliz. in banck le roy*, there cited, and so adjudged.

Coulters Case, fo. 30. 40 & 41 Eliz. banco regis.

AN executor in his own wrong ought not to retain goods in his own hands to satisfie his own just debt, for every creditor by such means, when the goods be not sufficient, would strive to make himself executor *de son tort*, to satisfie himself, and bar others, &c. And it is not reasonable that one should take advantage of his own wrong, *non facies mahum, ut inde fiat bonum, & melius est omnia mala pati quam malo consentire*. It is also cleer, that all lawfull acts that such an executor doth, or disseisor, or an abator, &c. are good.

Hargraves Case, 41 & 42 Eliz. banco regis, fo. 31.

LESSOR bringeth debt against the administrator of the lessee for years, for rent due after the administration committed in the *debet*, and so it ought to be, because he himself took the profits, and nothing is assets in his hands but the profits, besides the rent; but in all actions brought by executors, (as executors,) the writ shall be alwaies in the *detinet tantum*, although the duty accrew in their own time.

Pettifers Case, 45 Eliz. banco regis, fo. 32.

UPON a *feri facias de bonis testatoris*, the sheriff returneth *nulla bona*, a writ issueth to the sheriff to inquire by inquest, if the executors have wasted, and how much, who returneth that they have, and judgment given against them, *de bonis propriis*, they bring error *in redditione executionis*, & the execution was reversed, for the course is, upon *nulla bona*, to have a speciall *feri facias* to make execution *de bonis propriis*, if they have wasted; and if the sheriff so doth where they have not wasted, they have remedy against him: but if he taketh an inquest and returneth it, although it be false, there is no remedy against the sheriff, or any other.

Robinsons Case, 1 Jac. com. banco, fo. 33.

EXECUTOR brings debt as administrator, and is barred by plea that he is executor, he may bring debt, as executor, for he was barred, as to the action of the writ, to have debt as administrator, but not to the action.

Reades Case, fo. 34. 2 Jac. com. banco.

WHEN a man dieth intestate, and a strange person taketh the goods of the intestate, and useth them, or sells them, this maketh him an executor of his own wrong, for when none assumeth to be executor, nor takes letters of administration, there the using of the goods is sufficient to charge one as executor *de son tort*, for those to whom the deceast was indebted unto, have not any other in this case against whom they may bring their actions for recovery of their debts. When an executor is made, and he proveth the testament, or assumeth upon him the charge, and doth administer, in this case, if a stranger takes any of the goods, and claim them for his own, this doth not make him an executor of his own wrong, because there is not another lawfull executor.

A lawfull executor shall not be charged, but with the goods that come to his hands, after that he assumes unto him the charge of the will, &c. but if another man first takes the goods, &c. before the lawfull executor hath assumed the execution, or proved the testament, in this case, he may be charged as an executor of his own wrong.

CONSTRUCTION OF THE STATUTES OF JEO-
FAILS, &c. AMENDMENT OF RECORDS, FINES,
RECOVERIES, &c.

Playters Case, 25 & 26 Eliz. banco regis, fo. 35.

THE defendant was found guilty in trespass *quare clausum fregit* & *pisces suos cepit*, and damages assessed intirely; it was moved in arrest of judgment, because in the count, neither the nature nor the number of fishes was shewed. It was answered by the plaintiff, that the defendant is found guilty to damages, and so *non refert* of what nature or number they are; 2. That the fishes themselves are not to be recovered, but damage for them, therefore no need to shew the certainty; 3. All the damages shall be intended to be given for the close broken, which is said in the declaration; 4. It is matter of form,

ayed by the statute of 18 *Eliz. cap. 14.* But judgement was stayd, for the office of the declaration is to reduce the writ to certainty, for otherwise, upon such a generall issue, if the jury give a false verdict, they cannot be attainted, and damages shall be intended to be given for all, because they are intire, but if they had been severed, the plaintiff shall recover for so much as is well pleaded, and this is matter of substance, and not of form, because it is no default of the clerk, but of the plaintiff, and therefore not aided by the statute.

Walcots Case, 30 Eliz. banco regis, fo. 36.

DEBT was brought against baron and feme, in the *detinet tantum*, upon an obligation by the feme before marriage; it ought to be in the *debet* and *detinet*, because the baron had the goods of the wife in his own right, and for that reason debt is brought against the heir in the *debet*, and this is matter of substance, and point of the action, not remedied by the statute of 18 *Eliz. c. 14.*

Bayneham Case, 30 Eliz. in scaccar, fo. 37.

AN *ejectione firmæ* of lands in A., B. and C. tryed for the plaintiff by a visne out of A. only, this is insufficient, and not remedied by any statute.

Gardiners Case, 21 Eliz. banco regis, fo. 37.

23 Jurors are returned; 12 appear and find for the plaintiff, this is remedied by 18 *Elizabeth, ca. 14.*

Bishops Case, 34 Eliz. banco regis, fo. 37.

VARIANCE is between the writ and count in name, the plaintiff recovers, the defendant bringeth error, the writ was removed, into the *kings bench*, and the judgment was reversed, because the statute remedieth where there is no original, but not where the original is vicious, and although it were removed after pleading, &c. yet because the fault appeared to the court, the judgment was reversed.

Tey's Case, 34 Eliz. banco regis, fo. 38.

BARON and feme levy a fine to one who grants and renders to them two, and to the heires of the baron, and after renders part to the feme in tail, the remainder over, the heir of the husband brings a writ of error, and assigns for error the said variance; 1. Resolved, that there needeth not a precise form in render upon a fine, but it shall be in this case construed as a grant by charter, for it is but a grant of record.

2. There are five parts of a fine.

1. The original.

2. The licence to accord, for which the kings silver is due, and ought to be entred upon the writ of covenant, and the summe, and he who payeth it, that is, he in whom the fee reposeth, the plea, and betwixt whom, &c. and the land ought to be mentioned.

3. The concord which is the substance of the fine, for if upon that the kings silver be paid, although the party die, the fine is good.

4. The note, which is many times taken for the concord.

5. And lastly the foot of the fine, after delivery of the indentures of the fine, the fine is said to be ingrossed.

3. The conusor shall not assign error in the render, because it is to his advantage, and none shall assign error, except it be to his disadvantage.

Dormers Case, 35 Eliz. banco regis, fo. 40.

A COMMON recovery is had in a writ of entry, in the *post de uno annuali redditu sive pensione quatuor marcarum*; and of an advowson, whereupon a writ of error is brought; 1. Because every *præcipe* ought to be certain, but here it is in the disjunctive; 2. A writ of entry in the post lyeth not of an advowson: but judgment was affirmed, and thereby 'twas resolved, 1. That a common recovery is not like to other recoveries, for it may be averred to an use; 2. It is by mutual consent, & *consensus tollit errorem*; 2. A writ of entry in the post lyeth of an advowson common, &c. to suffer a common recovery and not otherwise, for no other assurance can be had to bar the remainders.

2. The demand of the rent is good, for one of two things is not demanded, but one thing by two names, for rent and pension are *synonima*, and the rather here, because it is said to issue out of land, which a pension properly cannot; 3. Common recoveries are so usual that the court shall take notice that they are common recoveries.

Rowlands Case, 35 & 36 Eliz. banco regis, fo. 42.

A PANNEL of a jury is annexed to the *venire facias* without return, this is vicious and not remedied by 18 *Eliz. cap. 14.* for that remedieth insufficient returns, but but not where no return.

The Countesse of Rutlands Case, 34 & 35 Eliz. fo. 42.

ROBERT MOORE is returned upon the *venire facias*, but in the panel before the justices of *nisi prius*, and in the *postea*, he was named *Robert Mawre*, if it appear that *Moore* is his right name, and that it is he who is sworn, it is good, for by the common law this was a discontinuance against all the jurors, and discontinuances are aided by the statute, otherwise if it were mis-named in the *venire facias*, and had his right name in the *panel* and *postea*.

Cedwells Case, 36 Eliz. banco regis, fo. 42.

A JUROR who gave verdict, was misnamed in the *venire facias*, and had his right name in the *distringas*, and *postea*, and for that the judgment was arrested.

Nichols Case, 38 Eliz. banco regis, fo. 43.

C. brings debt upon a single bill against N. who pleaded payment without acquittance, which was found for the plaintiff, although issue was joyned upon a point not material, yet after verdict this is aided by 32 H. 8. and 18 Eliz.

Bohuns Case, 39 Eliz. fo. 44.

A FINE was levied of a mannor and other lands, to the value of twenty marks *per annum*, so that the kings silver is 40s. which was paid, but in entring of it upon the writ of covenant, the mannor was omitted, and thereupon error was brought; but after that, the transcript of the fine was removed into the kings bench, the judges of the common place amended the record, because it appears to them that the kings silver was paid for the mannor, and where the writ of covenant was, *dede meipso*, for *teste meipso*, they amended that also, and certified it into the kings bench upon diminution, and allowed.

Freemans Case, fo. 45. 41 Eliz. banco regis.

IN an original writ, &c. *quod nullus faciat vastum venditionem & districtionem*, where it should be *destructionem*, the fault was onely in one letter, the court resolved, upon good consideration, that it was matter of substance: for *districtio* is a Latin word, and altereth the sence of the statute; and matter of substance in an original writ is not remedied, but matter of form only, *vide statute* 32 H. 8. ca. 30. & 18 Eliz. ca. 14.

If an original at this day want form, or contain false

Latine, or vary from the register in matter of form, after verdict no judgment shall be stayed or reversed. But if it want substance; although it be the misprision of the clerk, this is not remedied by any statute.

Gages Case, 44 Eliz. banco regis, fo. 46.

A WRIT of covenant to levy a fine, bore date after the return, this is amendable because a common assurance, but in other actions no amendment, &c.

Cooks Case, 41 Eliz. com. banco, fo. 46.

A COMMON recovery of the mannor of *Isfield*, by the name of *Isfield*, is amendable, because it appeared to the court, by collateral things shewed unto them, that *Isfield* was intended to passe.

CASES OF PARDONS.

Francklins Case, 36 Eliz. fo. 47. in the star-chamber.

A BILL was exhibited for a riot in the star-chamber five years before the general pardon, 35 *Eliz.* and it was resolved that the kings fine was accepted, but not the corporal punishment, but if it were exhibited within four years, all shall be accepted. In this case, the kings attourney may proceed for the fine.

Guilbert Littletons Case, 39 Eliz. fo. 47. star-chamber.

A BILL exhibited in the star-chamber before the parliament, 35 *Eliz.* and returned after, this is excepted out of the general pardon, for it is depending before the return, but if an original writ issueth out of the chancery returnable in the common place, this is not depending before the return, because out of another court, but after the return; it shall be said depending by relation from the day of the *teste*, and if the tenant alien before the return and after the *teste*, this shall be said an alienation pending the writ.

Drywoods Case, 42 Eliz. star-chamber, fo. 48.

A BILL in the star-chamber more than four years, and within eight years, before the parliament in 39 *Eliz.* the plaintiff dyeth before the general pardon, this is pardoned, for this doth not depend now, and the words remaining to be prosecuted shall be intended for the party, and not for the kings attorney.

Vaughans Case, 40 Eliz. banco regis, fo. 49.

A WRIT of entry in the *quibus* depends in *Wales* before the general pardon, and after the demandant had judgement, but the tenant was not amerced: 1. Resolved, the amercement is pardoned because the *torte* was pardoned, which together with the delay was the ground thereof; 2. The statutes of *jeofailes* extend to *Wales*, because it was made parcel of *England* by the act of 27 H. 8.

Wyrrells Case, 41 Eliz. in the exchequer, fo. 50.

THE queen brings debt upon an obligation made by the defendant, to one who was outlawed, the defendant pleads the general pardon; and although that debts due to the queen are excepted, yet debts originally due to the subject, and after came to the queen, are not excepted, also the general pardon is to be taken beneficially for the subject, and most strong against the king.

Biggins Case, 41 Eliz. banco regis, fo. 50.

THE king may pardon burning in the hand, where the defendant is found guilty of man-slaughter, and hath his clergy in an appeal; 1. Because it is but to notify to the judges that he hath once had his clergy, and that he shall not have it again, by the statute of 4 H. 7. c. 13.; 2. Because it is no part of the judgment, and the party shall goe at large, although he be not burned by good construction of the statute of 18 Eliz. c. 7. which provideth that after clergy allowed and burning, he shall goe at large, for otherwise when he is pardoned he shall be imprisoned for ever. In the star-chamber the king may pardon corporal punishment for forgery, &c. but not if attained at the common law in an action of forgery of false deeds.

Halls Case, 2 Jac. com. banco, fo. 51.

A. C. libelled for defamation in the court christian against H. and had sentence and costs taxed at a day to be paid; A. sueth an appeal, and obtaines a pardon from the king, and brings a prohibition; 1. Resolved, all sutes in the court christian, *pro salute animæ*, or *reformatione morum*, are for the king as suits in the star-chamber, and he may pardon them before or after the sute commenced, but he cannot pardon where the party sueth for a thing in which he had interest, as tythes; 2. All proceedings in the court christian, *ex officio*, are for the king, and he may pardon them; 3. Although the sute may be pardoned, yet he cannot pardon the costs which are taxed; 4. Although the sentence by the appeal is suspended to many purposes, yet until reversal, the party had interest in the costs, not pardonable, and after a consultation was granted for the costs.

Pages Case, 30 Eliz. in the exchequer, fo. 52.

I. demiseth to his wife who is an alien, and before the death of the testator indenized, the date of the letters patents is corrupted, so that they bore date after his death, she obtains an exemplification, by commission under the exchequer seal, it is found that she was an alien, and an information is brought against her, and she pleads the exemplification ; 1. Resol. this office is void, for every office of intitling, as this is, ought to be by commission under the great seal ; but an office of instruction may be under the exchequer seal ; 2. It appeared not what authority the commissioners had, but *inquisitio capta virtute cujusdam commissionis*, &c.; 3. That the exemplification was pleadable by the statute of 13 *Eliz. c. 6.* which extends to all patents whatsoever without any restraint : an exemplification and an *inspeximus*, as an *innotescimus*, and a *vidimus*, are all one : a constat cannot be had without affidavit, and it is when letters are casually lost an *innotescimus*, or a *vidimus*, are always of a charter of feoffment, or other instrument, not of record.

Knights Case, 31 Eliz. communi banco, fo. 55.

THE prior of St. John of Ye. 26 *H. 8.* leased divers houses, reserving *5li. 10s. 11d. per annum* at the four usual feasts in *L. viz.* for one house *3li. 11d.* and so severally of the others, with condition of re-entry for non payment, and after surrenders to *H. 8.* who in *anno 36.* grants one house to the lessee, and another in fee, the lessee dyeth ; it is found by inquisition in the Com'. of Mid'. by commission under the exchequer seal, that *37s. 5d.* parcel of the said rent was arrear at *M.* for a quarter of a year, before the return of the office or seizure, the king grants the residue of the houses to one who leaseth to the plaintiff, who upon entry of the executors of the first lessee brings trespass, and the court being divided, it was argued in the exchequer chamber by all the judges.

1. Resol. this is an intire lease, and the *viz.* is but a declaration of the several values of the houses, and no

severance of the reservation, but by apt words divers parcels may be severally leased by one demise, and several rents reserved; 2. Admitting them several rents, yet the condition is intire, and in case of a common person by severance of any part of the reversion, will be extinct; 3. This being in case of the king his patentee of part shall not take advantage of the condition, but the king himself may, and the patentee to whom he grants the residue, although the lease originally made by a subject; 4. Although it be found that more was arrear than was reserved quarterly, yet it sufficeth that the office had matter of substance, and the jury in M. may find which are the usual feasts in L.; 5. the grant after office and before the return of it is good, and by entry without other seisure the lease is void; 6. This office under the exchequer seal is sufficient to intitule the king to a chattel.

Specots Case, 32 Eliz. banco regis, in error, fo. 57.

S. & sa feme bring a *qu. impedit* against the Bishop of E. and declare that J. A. was seised of a manor to which an advowson was appendant, and demised it to the feme for life, and they presented D. W. who dyed, and so it belongs to them to present; the defendant pleads that the plaintiff presented one who is *schismaticus inveteratus*, whereof he gave notice to the plaintiff; it was adjudged for the plantiffe, in the common place, and error brought thereupon.

1. Error, because no presentment alleged in J. A. but over-ruled for the presentment of the plaintiff, is sufficient for themselves; 2. The bishop ought not to shew any particular schism, for the court of the king cannot judge of it, but the bishop is judge: also it is cause to remove a coroner, *quia minus idoneus*: it was answered that he ought to shew the heresie in certain, and although the bishop is judge, yet, because his act is not of record, it is traversable, and although it belongs not to the kings court to judge of heresies, yet the general cause of sute being in their conusance, they shall determine of it by advise of divines, and the cause of removing a coroner is not traversable; 3. The bishop is twice amerced, and a

man can be amerced but once towards one man, &c. It was answered, that he was but once amerced; for the judgment in the kings bench was but a rehearsal of the former, yet admitting the second judgment thereby void; nevertheless the first judgment is good by the common law without damages, *quod fuit concessum per totam curiam.*

Fosters Case, 32 Eliz. in banco le roy, fo. 59.

IT was resolved that the constable having a warrant to bring one *coram aliquo justiciar.* &c. it is at the election of the officer to bring the party so attached to what justice he will; for it is greater reason to give the election to the officer, who (in presumption of law) is a person indifferent, and sworn to execute his office duly, than to the delinquent. *Wray*, Chief Justice, said, that a justice of peace may make his warrant to bring the party before himself, and it is good and sufficient in law; for it is most like that he hath the best knowledge of the matter, and therefore most fit to doe justice in that matter: upon refusal to find surety, the constable may commit him without a new warrant,

Gooches Case, 32 Eliz. in banco le roy, fo. 60.

WRAY, Chief Justice, said, that if A. make a fraudulent conveyance of his lands to deceive a purchasor, against the statute of 27 *El.* and continueth in possession, and is reputed as owner; B. entereth in communication with A. for the purchase, and by accident B. hath notice of this fraudulent conveyance; notwithstanding he concludes with A. and takes his assurance. In this case B. shall avoyd the said fraudulent conveyance by the said act, notwithstanding the notice; for the act by expresse words hath made the fraudulent conveyance voyd as to the purchasor. And for as much as that is within the expresse provision of the statute, it ought to be taken and expounded in suppression of fraud. Resolved, that fraud may be given in evidence, because the estate is voyd by the act of 13 *Eliz.* and fraud is hatched in secret, *in arbore cava & opaca.*

And according to this opinion, it was resolved, *per tot'*

cur' in communi banco, Pasch. 3 Jac. where one *Bullock* had made a fraudulent estate of his lands within the statute of 27 *Eliz.* to A., B. and C. and after offered to sell the same to one *Standen*, and before the assurance by *Bullock*, *Standen* had notice thereof, and notwithstanding proceeded, and took the assurance from *Bullock*, *Standen* avoyded the former assurance of fraud by the said act, for the notice of the purchasor cannot make that good which an act of parliament hath made void as to him. And it is true, *quod non decipitur qui scit se decipi*. But in this case the purchasor is not deceived; for the fraudulent conveyance whereof he had notice is made void (as to him) by the statute, and therefore he knew it could not hurt him.

Sparies Case, 33 Eliz. in scaccar. fo. 61.

IN action of trover and conversion, the defendant pleads that there is another action depending in the kings bench for the same trover, and good; for in actions which comprehend no certainty, as assize or trespass, this is no plea before a count; because thereby it is made certain, and then it is a good plea, and not before: but in this action and debt and detinue, it is a good plea at the first, because they are certain: that an action is depending in an inferiour court is no plea.

CASES OF BY-LAWES.

Chamberlain de Londons Case, 32 Eliz. in banco le roy, fo. 63.

THE inhabitants of a village, without any custome, may make ordinances or by-lawes for reparation of the church, or of high-ways, or any such thing which is for the publique weal generally; and in this case the consent of the greater part shall bind all without any custome. *Vide 44 E. 3. 19.* But if it be for their own private profit for that town, as for their well ordering of their common of pasture, or such like, then without custome they cannot make by-lawes. And if it be a custome, yet the greater part shall not bind all, if it be not war-

ranted by the custome ; for as custome hath created them, so they ought to be warranted by the custome, 8 E. 2. tit. Ass. as pontage, murage, toll, and such like, as appeareth in 13 H. 4. 14. In which cases the summes for reparations of the bridgewalls, &c. ought to be reasonable, that the subject may have more benefit thereby than charge.

Clerks Case, 38 Eliz. in communi banco, fo. 64.

KING Edward 6. did incorporate the town of *St. Albones*, and granted them to make laws and ordinances, &c. The term was kept there, and the mayor, &c. by assent of the plaintiff, assessed every inhabitant for the charges in erecting of the courts there, and if any did refuse to pay, &c. to be imprisoned, &c. the plaintiff being burges refused to pay, &c. and the mayor justified, &c. and it was adjudged no plea, &c. For this ordinance is against *magna charta, ca. 29. nullus liber homo imprisonetur*, which act hath been confirmed divers times, (*viz.*) thirty times, and the assent of the plaintiff cannot alter the law in this case. But it was resolved, that the mayor, &c. might inflict reasonable penalty, but not imprisonment, which penalty ought to be levied by distresse ; for which offence an action of debt lyeth, and the plaintiff in this case had judgment.

Jeffrays Case, Michaelis, 31 & 32 Eliz. en bank le roy, fo. 67.

WILLIAM JEFFRAY, gent. brought a prohibition against *Abraham Kenshley*, and *Thomas Foster*, church-wardens of *Haylesham* in *Com. Sussex*, for that they sued him in court christian before Doctor *Drury* for certain money imposed upon him without his assent, for repair of the church, that the church-wardens, with the assent of the greatest part of the parishioners *juxta quantitatem & qualitatem possessionum & reddit. infra dict. parochiam existent.* determined and agreed to make a taxation for repair of the said church, and that notice of such assembly was given in the church, at which day the church-wardens and greater part of the parish, which were there

assembled, made a taxation, (*viz.*) every occupier of land for every acre, 4d. &c. *Jefferay* dwelt in another parish, and declared that the parishioners of every parish ought to repair their church, and not the church of another parish. *Cook*, of council with the defendant, demurred in law, and after many arguments a writ of consultation was granted. And it was resolved, that the court christian hath consens *de reparatione corporis sive navis ecclesie*: *Briton* who writ in 5 E. 1.

And in the statute of *circumspecte agatis*, but in *rebus manifestis errat qui autoritates legum allegat, quia perspicue vera non sunt probanda*. It was also resolved, that although *Jefferay* did dwell in another parish, yet for that he had lands in the said parish, in his proper possession, he is in the law *parochianus de Haylesham*.

But it was resolved, that where there was a farmor of the same lands, the lessor that receiveth the rent shall not be charged, but the inhabitant is the parishioner, and the receipt of the rent doth not make the lessor a parishioner.

Divers of the civil lawyers certified the court, that the church-wardens, and a greater part of the parishioners (upon a general warning) assembled, may make a taxation by their law, and the same shall not charge the land, but the person in respect of the lands for equality and indifferency, and this was the first leading case that was adjudged and reported in our books touching these matters, and many causes after were adjudged thus, and now it is generally received for law.

The Lord Cheney's Case, 33 Eliz. in cur. wardo, fol. 68.

IN a devise of lands by writing, an averment out of the will shall not be received, for a will concerning lands, &c. ought to be in writing, and not by any averment out of the same; otherwise it were great inconvenience that not any may know by the written words of the will, what construction to make, if it might be controuled by collateral averment out of the will.

CASES OF USURY.

Burtons Case, 34 Eliz. banco regis, fo. 69.

A. lends to T. W. 100l. 7 July, 21 Eliz. in consideration of which T. W. grants to him a rent charge of 20l. *per annum*, the first payment to be at the nativity, 1580, upon condition of payment of the said 100l. this is out of the statute of usury, for he had a 100l. for a year and a quarter, without consideration, and if he pay it within this time, A. shall not have the rent, so that he was not assured of any consideration: but if it were agreed between them that the 100l. shall not be paid, this is within the meaning of the statute. A demurrer is a confession of all such matters in fact onely as are well and sufficiently pleaded.

Claytons Case, 37 Eliz. com'. banco, fo. 70.

THIRTY pound was lent for half a year to have for it thirty-three pound, if the sonne of the obligee be then in life, if not 27 pound; this is within the intent of the statute of usury: *usura dicitur ab usu & ære, quasi usu-æra, (1.) usus æris? Et usura est commodum certum, quod propter usum rei mutata recipitur: Glandvile, lib. 7. cap. 16.*

Hoes Case, 34 Eliz. fo. 71.

A DUTY certain upon a condition subsequent may be released before the day of the performance of the condition; but a duty uncertain at the first, and upon condition precedent to be made certain after, this in the mean time is but onely a meer possibility, and therefore cannot be released. And it was adjudged, 4 El. in *communi banco*, that by a release of all actions, sutes, and quarrels, a covenant before breach of it is not released thereby. But by a release of covenants, the covenantor is discharged before the breach. *Vide Litt. 170.*

A release in the time of vacation, to the patron, dischargeth an annuity wherewith the parson is charged in respect of the parsonage, and a warranty may be released before sute, because he may have a *warrantia charta*.

St. Johns Case, 34 Eliz. banco regis, fo. 72.

DAGGS' pistols, &c. are within the statute of 33 H. 8. ca. 6. the same statute doth prohibite crosse-bows, and under the same name stonne-bowes are forbidden; for if a small alteration or addition should defeat the penalty of the act, the statute should be of small effect. And it was resolved, that the sheriff, or any of his officers, for the better execution of justice, may carry handguns or other weapons invasive or defensive, and not restrained by the general prohibition of the said act. *Vide 3 H. 7. fo. 1.*

Williams Case, 34 & 35 Eliz. banco regis, fo. 73.

ONE man shall not have an action of the case for common nusans made in the high way, because it is a common nusans, and it is not reason that any particular person should have an action, for then every particular person might have an action for the same, and so thereby one might be punished an hundred times for one cause. But if any particiular person have more particular damage than another, he may have a particular action upon the case for his particular injury; and for common nuisances, which are equal to all the kings people, the common law hath appointed other courts, *viz.*) leets, &c. A prescription to do divine service in a chapel for the lord and his tenants is remediable only in the court christian: but for the lord and his private family, an action of the case lyeth for the lord only.

Case of Orphans of London, 35 Eliz. banco regis, fo. 74.

IF any orphan of London sue for goods, &c. in the court christian, or of requests, a prohibition lyeth, because their government by their custome belongs to the mayor of L. So if a will be proved in the court christian, the probate whereof belongeth to the lord of manner.

Wymarks Case, 36 Eliz. banco regis, fo. 74.

PLAINTIFF in an *ejectione firma*, counts of a lease of R. S. the defendant pleads in barre an indenture of bargain and sale (and sheweth it) by the said R. S. to E. W. who was seised untill disseised by R. S. who leased to the plaintiff, and he as servant to E. W. enters; three terms after, the plaintiff replies that the bargain and sale was upon condition, which was broken, and the bargainer entered and leased to him, and did not shew forth the deed of bargain and sale: judgment given for the defendant.

1. Resol. when a deed is shewed to the court, it remaineth in the court all the term in judgment of law, because the term is but one day in law, and this as well to strangers as parties, so take advantage thereof without shewing, but at the end of the term it shall be delivered to the party, if it be not denied, for then it shall remain in court to be damned, if it be found not his deed.

2. The course in the kings bench is, that imparlances to plead in barre are entred, but not imparlances to reply or rejoin, so that the replication here, although it be three terms after the barre, yet it shall be intended here the same term, and so he shall not need to shew the deed.

Cliftons Case, 35 Eliz. fo. 76.

IF a woman tenant for life take a husband which committeth waste, and after the wife dyeth, the husband is dispunishable of and for such waste; for the writt is *quare de communi consilio, &c. provisum sit quod non liceat alicui vastam venditionem seu destructionem facere de terris, &c. sibi demissis ad terminum vitæ vel annorum, &c.* And in this case the husband hath not any estate for life in this land; but the wife hath estate for life, and the husband but only an estate in her right, and so he is not within the act.

Pilkingtons Case, 43 Eliz. en banco le roy, fo. 76.

IT was resolved *per tot' cur.* that when a distress is taken for damage fesant, that the party may tender amends until the beasts be impounded; but after they be in the pound, they are in the custody of the law, and then the tender commeth too late. It was also resolved, that tender of amends to the bayliff, or servant that taketh them, will not serve; for he cannot deliver the distresse once taken, no more than change the avoury of his master, or demand rent upon a condition of reentry.

The Earl of Pembrooks Case, 36 Eliz. banco regis, fo. 76.

WHERE the defendant sheweth a deed to the court, the plaintiff may pray it to be entred *in hæc verba* the same term, but not after.

Pagetts Case, 35 Eliz. in communi banco, fo. 77.

IT was resolved, that if tenant for life, the remainder for life, the remainder in fee, if tenant for life maketh waste in trees, and after he in remainder for life dye, an action of waste is maintainable, for the wast done in the life of him in remainder for life, because it was to the disinheritance of him in remainder in fee. And now the

impediment (which was the mean estate for life) is taken away. *Et remote impedimento emergit actio*; it was resolved, that when the trees are cut down, the property thereof belongeth to him in remainder in fee. And where it is said in some books, that he in remainder or reversion in fee shall not have an action of waste, it is to be intended during the continuance of the mean remainder. And in other books is said in this case that an action of waste doth lye, it is intended after the death of him in remainder for life.

Booths Case, 36 Eliz. in communi banco, fo. 77.

GEORGE BOOTH brought an action of waste against *Skevington*, and declared that Sir *William Booth* demised for years to *Ensor*, who assigned to *Skevington*. The defendant pleaded an assignment to *Elizabeth Cave*, before which assignment no wast was made; the plaintiff replied, and shewed the statute 11 *H. 6. ca. 5.* and that the grant to *Elizabeth Cave* was made to the intent he should not know against whom to bring his action, and averred that *Skevington* did take the profits; the defendant rejoined that *Elizabeth Cave* granted her estate to *A.* who demised to the defendant at will, and traversed the fraud, &c. the plaintiff demurred; it was resolved, that every assignee of every lessee mediately or immediately is within the said act, for the statute was made to suppress fraud, and deceit, and therefore it should be taken most beneficially. Secondly, that he in remainder is within the said act, as well as he in reversion. Thirdly, the intent of fraud aforesaid is not traversable, but the taking of the profits, which is a thing notorious, wherof the country may have knowledge. In a formedon the tenant pleaded *non tenure*, the demandant said that he made a feoffment to persons unknown to defraud him of his tenancy, and to keep the profits, the pertinancy of the profits, and not the feoffment, is traversable.

Samons Case, 36 Eliz. banco regis, fo. 78.

THE plaintiff and defendant referred all controversies to the arbitrement of I. S. who did arbitrate that the defendant shall enter into an obligation to the plaintiff that the plaintiff and his wife shall enjoy certain lands which he had not done; this is void for the uncertainty of what summe the obligation shall be, for the award ought to be certain, like a judgement: also the award was void as to the feme, for she was a stranger to the submission.

Graves Case, 37 Eliz. banco regis, fo. 79. repleckis.

THE plaintiff intitles himself in barre to the avowry to common, &c. which was traversed, the jury found that every, &c. time of mind have used to pay for the common a hen and five egges; the plaintiff had judgment, for he needs not shew more than makes for him, for this is not *modus communis*, paying so much, nor parcel of the issue, but a collateral recompence to be paid for the common, to which the terretenant had remedy, but if the terretenant had no remedy, then the commoner shall have the common *sub modo*, and may be disturbed by the terretenant.

Fitz-Herberts Case, 37 Eliz. banco regis, fo. 80.

THE father tenant for life, the remainder to the son in tail, leaseth for years to A. to the intent to barre the son. A. infeoffeth I. S. to whom the father releaseth with warranty, and dyeth, this doth not barre the son, for although that the disseisin which is made by the feoffment precedes the warranty, yet because it was to that intent, the law will adjudge upon the intire act, and so a warranty by disseisin; 2. Although the disseisin was made to the father, yet because he consented unto it, the warranty commenceth by disseisin; but if the father had made a feoffment in fee and dyed, this shall bind the son, if it be with warranty.

Foords Case, 37 Eliz. com'. banco, fo. 81.

A PREBEND leaseth for 70 An. patron, deane and chapter confirm *dimissionem prædictam in forma prædicta fact.* for 51 years *et non ultra*, this is a confirmation for all the term; for when they confirm *dimissionem*, &c. for 51 years, it is repugnant, but if they had recited the lease, and confirmed the land for 51 years, this had been good, for they have an authority, coupled with an interest, otherwise if only a bare authority: but by what words soever they confirm a lease for life, or gift in tail for part, this is a confirmation of all, because they are intire; so if the estate of the desceisor, or his lessee for life, be confirmed for an hour, yet all is confirmed.

CASES OF CUSTOMES.

Snellings Case, 37 Eliz. com'. banco, fo. 83.

S. brings debt upon an obligation against an administrator, who pleads there is a custome in L. that an administrator shall pay debts upon contract to a citizen, as well as upon obligation, and that I. S. upon a contract had recovered; and good; 1. Resol. although that debt is given against an administrator by the statute of 31 E. 3. yet because they were charged as executors before, so that only the name is changed, the custome generally alledged is good; 2. The ordinary by taking the goods, was chargeable at the common law; 3. This custome bindeth strangers.

The Case of Market-overt, 38 Eliz. fo. 84.

SHOPS in L. are markets overt for things to be sold there by the trade of the owner, therefore, if plate be sold there in a scriveners shop, the property is not altered, otherwise in a gold-smiths shop, if he who passeth in the street may see it. *Nota*, the reason of this case extends to all markets overt in *England*.

Perimans Case, 41 Eliz. com. banco, fo. 84.

IT is a good custome of a mannor that all sales of lands within that mannor be presented at the court of the mannor. *Obj.* what remedy if the steward will not except the presentment? *Resp.* what remedy if the clerk will not inrolle a deed of bargain and sale, and therefore *caveat emptor*; 2. *Obj.* that interest is by the feoffment vested in the feoffee, which shall not be devested by the custome. *Resp.* that livery was ordained to give notice, and a custome which addeth more solemnity, and notice is good.

Sir Henry Knivets Case, 38 Eliz. banco regis, fo. 85.

TENANT for life, the remainder in fee, leaseth for years, the termor is ousted, the disseisor leaseth for years, his lessee sows the land, tenant for life dyes, he in the remainder enters, I. S. takes the corn, he in remainder brings trespass. The right of the corn is not in the plaintiff or defendant, but in the lessee for years of lessee for life, but the lessee of the disseisor had right against the plaintiff by reason of the possession: and for that if he had pleaded that he had entered to take the corn, this had been good, but because he pleaded *non culp.* the plaintiff had judgement for the entry, and was barred for the residue.

Penrins Case, 38 Eliz. banco regis, fo. 86.

W. P. brings a *quod ei deforceat*, in nature of a writ of right in *Wales*, and after the mise joined is nonsute, judgment final is given, he brings the like writ, and the first judgment is pleaded in barre, the demandant demurres, and adjudged against him, and he brings error; 1. Although by the statute of 12 E. 1. trial of right in *Wales* shall be by common jury, yet judgment final shall be given; 2. Erroneous judgement final in right shall bind until it be reversed; 3. Judgement final shall not be given upon default of the tenant in a writ, but a *petit cape* shall issue, for peradventure he may save his default.

CASES OF EXECUTIONS.

Blumfields Case, in banco le roy, 39 Eliz. fo. 87.

TWO men were bound jointly and severally in an obligation, the one was sued, condemned, and taken in execution, and after the other was sued, condemned, and taken in execution, and after the first escaped, and the other brought an *audita querela*; and although the plaintiff might have his action against the sheriff upon the escape, yet until he be satisfied indeed, the other cannot have his *audita querela*, for if the defendant be sued by one writ or several proces, although the entry be *quod unica fiat executio*, this is to be understood of one execution with satisfaction, for he may have three bodies in execution. *In communi banco inter Lynacre & Rodes Case, Hil. 33 El.* it was adjudged, that notwithstanding the conusor in a statute staple was taken and escaped, yet his goods and lands upon the same statute may be extended for the escape, and the action which the plaintiff might have against the sheriff is not a satisfaction of the debt. And if so the conusor be taken and dye in execution, the conusor shall have execution of his goods and lands. And it was adjudged, *24 E. int. Joanes & Williams*, that where two men were condemned in a debt, and the one taken and dyed in execution, yet the taking of the other was lawful, and then it was resolved, *per tot. cur.* that if a defendant dye in execution, yet the plaintiff may have a new execution by *elegit*, or *feri facias*, &c.

The execution of the body is an execution, but not a satisfaction, as appeareth in *4 H. 7. 8.* and *32 H. 6. 47.* In *Hillaryes Case* adjudged, but a gage for the debt, for the words of the writ are, *capias I. S. ita quod habeas corpus ejus coram justic. nostris, &c. ad satisfaciendum G. L. de debito & damnis, &c.* and so his body is taken to the intent he should satisfie, and when the defendant hath paid the money, he shall be discharged out of prison.

Garnons Case, 40 Eliz. fo. 88.

LAYTON recovered against *Walwyn*, in an action of debt, and out-lawed the defendant after judgement, and sued a *cap. utlag.* and delivered the same to *Garnon* the sheriff, who did take the party, and before the return of the writ, the defendant escaped: and thus it was resolved, that if any one at the common law have judgment in an action of debt, and after judgment out-law the defendant, then the plaintiff is at the end of the suit, for any processe to be sued in his name, yet if the defendant be taken by *utlary*, at the sute of the king, no *laches* being in the plaintiff, in continuance of his process, he shall be in execution for the plaintiff, if he will, for reason requireth that if the king shall have benefit by the sute of the party, so the plaintiff shall have benefit by the sute of the king; if judgement in error be affirmed within the year, a *capias* or *feri facias* lyeth without any *scire facias*, although in another court.

Frosts Case, in communi banco, 41 Eliz. fo. 89.

FROST recovered debt and damages against *B.* who was out-lawed after judgment, and a *cap. utlagatum* delivered to the sheriff of *London*, *Laborne*, a serjeant, arrested the said *B.* in *Fleet street*, *ad respondendum*, *A. Laborne* kept *B.* in his house, and then *Frost* came to *Laborne* with the sheriffs warrant, to arrest *B.* upon the said *cap. utlagatum*, the which to doe *Laborne* refused, and afterwards the sheriff suffered the said *B.* to goe at large, and upon this matter *Frost* brought his action upon the case against the sheriff, and supposed that the sheriff did arrest the said *B.* by vertue of the said *cap. utlagatum*, and that he suffered him to goe at large, and the defendant pleaded *non permisit cum ire ad largum*. The jury found all the said special matter, and judgment was given for the plaintiff. For, first, it was resolved, that when a man is in custody of the sheriff by processe of the law, and after another writ is delivered unto him to apprehend the body of him who is in his custody, immediately he is in his custody by force of the second writ, by

judgment of law, although he make no actual arrest of him, for to what purpose should he arrest the party that is already in his custody? *Et lex non præcipit inutilia quia inutilis labor stultus*; and the words of the writ are not only *capias*, &c. but also *salvo custodias*, &c. *ita quod habeas corpus coram*, &c. and so he ought safely to keep him. *Vide 7 H. 4. 30.* And the defendant ought not to be discharged until he had found surety to satisfie the plaintiff by *5 E. 3. cap. 12.*

Hoes Case, 42 Eliz. fo. 90. in the exchequer.

EXECUTION of a writ of execution, as well at the sute of a common person as at the kings sute, is good without return of the writ, for if a man be arrested upon a *cap. ad satisfaciendum*, the execution is good although the sheriff do not return the writ, and so in all writs of execution, where the sheriff doth only execute the same, as *cap. ad satisfaciendum, habere fac. seisinam vel possessionem, fieri facias liberat.* If the execution be duly made, it is good, but if *cap.* in process be not returned, the arrest is not lawful, for there the intent of the writ is, to bring the party to answer the plaintiff, and in case of an *elegit*, for there the extent is to be made by inquest, and not by the sheriff only; and the writ ought to be returned, otherwise it is of none effect. In this case it was resolved, that when one hath a power of revocation, yet if he suffer any thing to be lawfully executed, as touching that, he cannot make any revocation: as if a man make a letter of attourney to another to doe any thing, before execution he may revoke it, but after execution lawfully done it cannot be revoked; if one to whom another is indebted be outlawed, and he that oweth the mony payeth it to the king, and the outlary is after reversed, yet the creditor shall recover his debt against the party, if the goods of an out-lawed person be sold by the sheriff upon a *cap. utlagat.* and after the outlary is reversed by error, the defendant shall have restitution of his goods, for the sheriff, or escheator, is not compellable to sell the goods, but he may keep them to the use of the king, agreeing to the book. *20 Eliz. Dyer, 363.* but if a sheriff, by vertue of a *fieri facias*, sell the goods, and after the judgment be reversed by error, the defendant shall not

have restitution of the goods, but the value of them for which they were sold. And the reason is, the sheriff is compellable to levie the debt of the goods of the defendant, and therefore great reason that the sale should stand.

Semaynes Case, 2 Jac. fo. 91. banco regis.

THAT the house of every man is to him as his castle and fortress, as well for his defence against injuries and violence, as for his repose; that if a man kill another in his defence or per-misfortune, without any intent, yet it is felony, and he should lose his goods and chattells, for the great regard that the law hath to the life of a man. But if thieves come to the house of a man to rob or murder, and the owner or his servants kill any of the thieves, in defence of him or his house, this is not felony, neither shall he lose any thing; any man may assemble his neighbours or friends to guard his house against violence, but he may not assemble them to goe with him to the market, or abroad, to safe-guard him against violence, and the reason of all this is, *domus sua cuiq; est tutissimum refugium*. It is resolved, that when any house is recovered by any real action, or by *ejectione firmæ*, the sheriff may break the house, and deliver seisin or possession. It was also resolved, that in all cases where the king is party, the sheriff may break the house (if the doores be shut) and make execution of his writ, but before he break the house he ought to signify the cause of his coming, and make request to have the doores opened. *West. 1. cap. 17.* which act is but an affirmance of the common law, but if the officer break the house when he might have the doores opened, he is a trespasser. *41 Ass. pl. 35.* For felony, or suspicion of felony, the officer may break open the door; in all cases where the door is open, the sheriff may enter and make execution of his writ either for body or goods, at the sute of a subject, or the lord may distrain for his rent. But it was resolved, that the sheriff, at the sute of a common person, (upon request made to open the doors and denial thereof,) ought not to break open the door, or the house, to execute any process at the sute of any subject, or to execute a *fieri facias*, being a writ of execution, but he is a trespassor, yet if he doe execution in the house, it is good in the law, being

done; it was also resolved, that the house of a man is not a castle or defence for any other person but for the owner, his family and goods, and not to protect another that flyeth into the same, or the goods of another, for then the sheriff, upon request and denyal, may break the house; and doe execution. And this is proved by the statute of *West. 1. ca. 17.* whereby it is declared, that the sheriff may break the house or the castle to make replevin, when the goods of another that he hath distrained, are conveyed away to prevent the owner, but in this case the sheriff must demand the goods first.

Barwicks Case, 39 Eliz. in exchequer, fo. 94.

THE queen, 28 *die Julii, anno 26*, demised the manor of Sutton to *Humfrey Barwick, tenend. sibi a die consecrationis.* It was resolved, that the same 28 day of July is excluded, and the demise began the 29 of July. It was also resolved, that an estate of freehold cannot commence *in futuro*, but ought to take effect presently in possession, reversion or remainder. A lease for years may commence in future, but not a lease for life, and the reason is, for that a lease for years may be made without livery and seisin, but an estate of freehold may not be made without livery, either in deed or in law, and therefore when a man maketh a lease for life, to commence at a day to come, he cannot make a present livery to a future estate; and therefore in this case nothing passeth, and it is all one whether it commenceth at a day to come, or years to come, for the distance of the times doth not make alteration in this case, but in the case of two joynt lessees, the livery made to one is good in the name of both, for they have interest in the land, before their entry, and livery to one in the name of both maketh an actual possession in both, which is sufficient to support the remainder to a third person in fee. *Vide Claytons Case*, in the fifth book, a license to occupy land for one yeare, is a lease for one year. *5 H. 7. 1.* in consideration of a former demise to be surrendered, which was false and void, is a void consideration as to the queen.

Goodalls Case, 40 Eliz. banco regis, fo. 96.

CONDITIONS for payment of money touching inheritance, ought to be truly performed, and not covenous, if they concern a third person. The law doth not find an assignee in law where there is an assignee in fact. *Expressum facit cessare tacitum*; affirmed in the exchequer chamber upon error there brought.

Countesse of Northumberlands Case, 40 Eliz. communi banco, fo. 98.

FITTON, and the Countesse of *Northumberland* his wife, *Sir Thomas Cicil*, knight, and *Dorothie* his wife, *William Cornewalleys*, and *Lucy* his wife, and the lady *Davers*, daughters and heirs of the Lord *Latimer*, brought a (*quare impedit*) against *Hall*, who pleaded a release of *William Cornewalleys*, *pendente breve*, and it was adjudged that this should but goe in barre only against *William Cornewalleys* and his wife, and the writ should stand for others, and all shall vest in the others, because intire, and in the realty, presentment of the lessor and lesse is not double, for the lessor's only traversable.

Buries Case, 40 Eliz. in communi banco, fo. 99.

BETWEEN *Whebster* and *Burie* in *ejectione firmæ*, a special verdict was given upon divorce between *Burie* and his wife, *causa frigiditatis*, and that his wife for three year, after the marriage, *remansit virgo intacta propter perpetuam impotentiam generationis in viro. Et quod vir fuit ineptus ad generandum*; and in this special verdict all the examinations of the witnesses, upon which the judge in the spiritual court was moved to give his sentence, by which the perpetual disability of *Bury ad generandum* was manifest, were read; and by which it was pretended that the issue which he had by a second wife was illegitimate, and this was the doubt of the jury, and it was adjudged, that the issue of the second wife was lawful, for it is clear that by the divorce (*causa frigiditatis*) the marriage is dis-

solved a *vinculo matrimonii*, and by consequence, either of them might marry after, then admitting that the second marriage was avoydable, yet it remaind a marriage until it was dissolved, and by consequence, the issue that is born during the coverture (if no divorce be in the life of the parties) is lawfull, *et homo potest esse habilis & inhabilis diversis temporibus*, and judgement affirmed in error.

Flowers Case, 41 Eliz. banco regis, fo. 99.

AN indictment of perjury upon 5 *El.* for giving false evidence to the great inquest is not within the statute, for it must be in matter depending in sute by bill, writ, action, or information, vide le statute. *Plus peccat author quam actor.*

Rookes Case, 40 Eliz. fo. 100.

THAT the commissioners in the commission of sewers ought to tax all which are in damage, or in danger of damage, for non-repair of the bancks, and not only him which hath the land next adjoyning to the river. The commission is grounded upon the statute 6 *H. 6. cap. 5.* for if the law were otherwise, great inconvenience might follow, for it might be that the rage and force of the water might be such, that the value of the land adjoining would not serve to amend the bancks, and therefore the statute would have all in peril, and which take commodity by the making of the bancks to be contributory, for *qui sentit commodum sentire debet & onus, & ipsæ leges cupiunt ut jure regantur.*

And notwithstanding by the words of the commission, authority is given to the commissioners to doe according to their discretions; yet their proceedings ought to be limited and bounded with the rule of the law and reason. For discretion is a knowledge, or understanding to discern between right and falshood, truth and wrong, shadows and substances, equity and colourable glosses and pretences, and not to doe according to their wills and private affection; for a learned man saith, *talis discretio discretionem confundit.*

Penruddock's Case, 40 Eliz. fo. 101.

IN a *quod permittat* between *Clarke*, assignee of *Thomas Chickley*, plaintiff, and *Ed. Penruddock* and *Mary* his wife defendants, assignee of one *John Cock*, for that *Cock* 20. 8 bris, 10 *Maria*, erected upon his freehold a house in *St. Johns* street so neer the curtelage of an house of *Thomas Chickley*, that *domus illa super pendet, Anglice*, doth overhang *magnam partem videlicet*: 3. *pedes curtilagii* the plaintiff, *sic quod aqua pluviales de eadem domo decedentes solum ejusdem curtilagii conterunt, & magnopere ac indies magis magisque consumunt & devastant, ac ea ratione curtilag' præd. quolibet pluviale tempore humectat' & inundat. existit, quod prædictus Henricus Clarke inhabitans in eodem messuagio nullum proficuum seu easiamantum de eodem curtilagio percipere possit, ac nocumentum liberi tenuenit præd'. &c.* And it was resolved, that the distilling of the waters in the time of the feoffee or assignee is a new wrong; and this writ lyeth after request of amendment, but not before, but it lyeth against him that did the wrong without request, and the action good, &c.

Windsors Case, 41 Eliz. fo. 102.

IN a *quare impedit* by *Windsor* against the Archbishop of *Canterbury* for the church of *Buscott* in the county of *Bark*: it was adjudged, that if two have title to present by turn, and the one present, who is admitted, instituted, and inducted, and afterwards is deprived for crime, heresie, &c. yet that patron should not present again, but that shall serve for his turn. So likewise if he present a meer *Laicus*, which was admitted, instituted, and inducted, although it be declared by sentence that he was incapable, and therefore void *ab initio*, yet because the church was full untill the sentence declaratory be pronounced, yet that shall serve for his turn. But when the admission and institution are merely void, then that shall not serve for one

turn, as if a presentee be once admitted, instituted, and inducted, but hath not subscribed to the articles, &c. according to the statute of 13 *Eliz.* by which in this case the admission, institution, and induction are void. 23 *El. Dier, pl. ult. ace.*

Hungatts Case, 43 Eliz. com. banco, fo. 103.

HUNGATT brought an action of debt upon an obligation against *Mese* and *Smith*; the condition was to perform an award between the plaintiff on the one party, and the defendants on the other; *ita quod arbitrium præd. fiat & deliberetur utrique partium præd.* before such a day, the arbitrament before the day was delivered to the plaintiff and to *Mese*, but not to *Smith*, judgment was given against the plaintiff. It was resolved, that if two be of one party, and two of another, and the words are *ita quod deliber. utriq; partium*, that the delivery of the arbitrament to one of the one part, and another of the other party is not sufficient; for the party is to be intended of the whole party, for one is as well within the penalty and danger of the obligation as the other; and *uterq;* is taken sometimes *discretive*, sometimes *collective*, *secundum subjectam materiam*; but here it is taken *collective*.

Bakers Case, 42 Eliz. fo. 104.

IF a plaintiff in evidence shew any matter in writing or record, or any sentence in the ecclesiastical court, whereupon law doth arise, and the defendant offer to demurre in law upon the same, the plaintiff cannot refuse to joyn, or wave his evidence, and so on the other party, and the reason is, for that matter in law shall not be put in the mouth of laymen, but the king in this case is at liberty.

Boulstons Case, 40 Eliz. in communi banco, fo. 105.

IT was adjudged that if a man make cony-borrowes in his own land, and the conies encrease to so great a number that they destroy his neighbours ground adjoyning, the neighbours may not have an action of the case; for presently when the conies come into his neighbors ground he may kill them, because they are *fera natura*. And in this case it was resolved, that none may newly erect a dove-house, but the lord of a mannor, and if any do, he may be punished in the leet; but no action of the case lyeth for any particular man, for the infinitenesse of actions that might be brought. And of this opinion, touching the new erecting of a dove cote, was Sir Roger Manwood, Chief Baron, and the barons of the exchequer in the exchequer chamber.

Aldens Case, 43. Eliz. com. banco, fo. 105.

ANTIEN demesne is a good plea in an *ejectione firma*, although it is not in trespass, because by intendment the freehold may come in debate, and the interest of the land is bound; antient demesne is extendable upon a statute by *elegit*, but in an assise by tenant by *elegit* antient demesne is a good plea. 22 Ass. pl. 45.

Sir Henry Constables Case, 43 Eliz. in banco le roy, fo. 106.

NOTHING shall be said *wreccum maris* but such goods only which are cast or left upon the land by the sea; *flotsam maris* is when a ship is drowned, or otherwise perish, and the goods flote upon the sea; *jetsam maris* is when a ship is in peril of drowning, as for disburthening thereof, the goods are cast into the sea, and after notwithstanding the ship perish. *Lagan vel potius ligam* is when the goods so cast out of the ship, and the ship perish, and such goods are so ponderous that they sinke to the bot-

some, and the mariners, to the intent to find them, bind thereunto a boy or a corke, or other such thing to find them again; *et dicitur ligari a ligando*, and none of these words which are called *flotsam*, *jetsam* or *ligan*, are called wreck so long as they remain in or upon the sea; but if any of them be cast upon the land by the sea, then it is said to be wreck, and by the statute 15 R. 2. ca. 3. the lord admiral shall not have consuance or jurisdiction of wreck of sea; but of the other three he hath; for wreck is when the goods are cast upon the land, and so within some county whereof the common law may take consuance; but the other three are upon the sea, *magis proprie dici poterit wreccum, si navis frangatur & ex qua nullus vivus evasit, & maxime si dominus rerum submersus fuerit, & quicquid inde ad terram venerit erit domini regis*; wreck may by prescription belong to the lord of a manor. It was resolved also, that the soyl upon which the sea doth flow and reflow, *scil.* between the high water mark and the low water mark, may be parcel of the manor of a subject. 16 El. Dier. And it was resolved that when the sea doth flow, *ad plenitudinem maris*, the high admiral shall have jurisdiction of every thing done upon the water between the high water mark and the low water mark, as felony, &c. No proof is allowable by the law but the verdict of twelve men; part of the goods were wreck, and part not, and damage assessed intirely, *ergo*, judgment given for the defendant. The king shall have *flotsam* upon the sea, because within the ligeance of the king.

Foxleys Case, 43 Eliz. banco regis, fo. 109.

IT was resolved, if a felon steal any goods, and leave them in a manor or town, or in his house, or in the house of another, or hide them in the earth, or any other secret place, and afterward fly, these goods are not forfeited, nor waife goods in the law, for waife is where a felon in pursute waveth or leaveth the goods, or for fear to be taken, thinking that pursute was or is made, having the goods with him in his possession, flyeth away and leaveth the goods. In these cases the goods shall be said waved in law; but if he had not the goods with him when he did fly, being pursued, or for fear of being apprehended, the goods are not waved, nor forfeited, but the owner may

take them again when he will, without any fresh sute. But if the felon in his flying wave them, the goods are forfeited by the common law, if the felon upon fresh sute be not attaint at the sute of the owner of the goods. And the reason that wave is given to the king, is for default of the owner, that he doth not make fresh sute after for to apprehend the felon. Wherefore the law doth impose the penalty on the owner.

Bona fugitivorum are the proper goods of him that flyeth away for felony; but it is to be observed, that if a man fly for felony, his goods are not forfeited untill they be found by indictment, or otherwise lawfully found of record upon his acquittal, that he fled for the felony, they cannot be claimed by prescription, because the things forfeited by matter of record cannot be claimed by prescription.

But waife, stray, treasure trove, wreck of the sea, &c. which things may be gained by usage without matter of record, there a man may prescribe to have *bona & catalla felonum*: in some cases *bona & catalla felonum* shall be forfeited by conviction, and sometimes without conviction, but alwaies when any forfeiture is of any goods of felons, it ought to appear of record, and that is the cause that such goods cannot be claimed by prescription.

Deodanda are goods which cause the death of a man by misadventure, and are not forfeited untill they be found of record, & therefore cannot be claimed by prescription, & the jury that presents or finds the death, ought to find and apprise the *deodandum* also, *omnia quæ movens ad mortem sunt deodanda, bona & catalla in exigendo positum*, are when any be appealed or indicted of felony, and withdraw or absent himself, for so long time as an exigent is awarded against him for his absentings, (which is a flying away in law,) he shall forfeit all his goods and chattells which he had at the time of the exigent, and after be found not guilty, 22 *Lib. Ass.* Look the statute 21 *H. 8. ca. 11.* concerning goods waved, and for restitution, &c.

Mallories Case, 43 Eliz. fo. 112.

RENDRING rent to one and his heirs, and to one or his heirs, are all one ; but a feoffment *tenendum* to one or his heirs, is but during the life of the feoffee ; *nemo potest plus juris in alium transferre quam ipse habet* : this case consisteth much upon attornements. *Vide le case.*

Wades Case, 43 Eliz. in communi banco, fo. 114.

A MAN was bound to pay 250 *li. legal. monet. Anglia*, on a day certain, the last time of the day that so much mony can be numbered is the best time, so that it be before the setting of the sun, and the most convenient time by law that both parties may meet : five shillings in Spanish money, and two pistolets in gold were tendered. It was resolved, that the Spanish silver was lawful money of England by proclamation in *tempore Philippi & Maria*, and so French crowns ; for the king by his prerogative and proclamation may make any forein coyn lawful money of England. That if a man tender more than he is bound to pay, it is good, *omne majus continet in se minus*, that the tendring of 250 *li.* in bags without shewing or numbering the same, is good tender, if the truth be that there was so much. *Vide Winters Case*, if there be any counterfeit money in the same, yet if the party then accept the same, he cannot compel the party to change it, or if it be rent, or for non payment a reentree, yet the once acceptance is good, and the lessor may not reenter.

Foliambes Case, 43 Eliz. fo. 116.

IN a writ of *estrepement*, the sheriff may resist them that will make waste, or cut down trees, and if he cannot otherwise, he may imprison them, and may make warrants to others, and he may take *posse comitatus* for his aid. A writ of *estrepement* lyeth in an action of waste, as well before judgement as after.

Olands Case, 44 Eliz. banco regis, fo. 116.

A FEME copy-holder *durante viduitate*, sowes the land and taketh husband, the lord shall have the corn, for although her estate was incertain, yet it was determined by her own act; so if lessee at will sowe the land, and determine the will, but if baron and feme are lessees during the coverture, and the baron sowe the land, and they are after divorced, *causa pracontractus*, the baron shall have the emblements, because this is the act of the court.

Pynnels Case, 44 Eliz. fo. 117. com. banco.

PTNNEL brought an action of debt upon an obligation against Cole, of 16*l.* for payment of 8*l.* 10*s.* on the 11 of Nov. 1600. The defendant pleaded, that at the instance of the plaintiff before the said day he paid him 5*l.* 10*s.* and it was resolved by all the court, that the payment of a lesser summe in satisfaction of a great summe, cannot be satisfaction for all, so that by no possibility a meaner summe may satisfie the plaintiff of a greater; but the gift of an horse, cow, robe, &c. in satisfaction is good.

But in this case it was resolved, that the payment of a parcell, and acceptance thereof before the day, in satisfaction of all, is a good satisfaction, in respect of the circumstance of time; for peradventure, parcel of that before the day may be more beneficial unto him than the whole sum of money at the day, and the value of satisfaction is not material, for if I be bound to pay you 10*l.* at *Westminster*, and you request me to pay 5*l.* at *York*, and you will accept the same in full satisfaction of the 10*l.* this is a good satisfaction in respect of the place, but in this case the plaintiff had judgement for the insufficient pleading, for he did not plead that he had payd 5*l.* 10*s.* in full satisfaction, (as by law he ought,) but pleaded the payment of part generally, and the plaintiff accepted the same in full satisfaction, and alwayes the manner of the tender, and of the payment, shall be directed by him that maketh the tender and payment, and not by him that accepteth it.

Edriches Case, 1 Jac. com. banco, fo. 118.

A RENT CHARGE is granted to B. for the life of C. the grantor leaseth for life to D. the remainder in fee to E. C. and D. dyes, B. distrains E. for all arrears, this is good by the statute of 32 H. 8. cap. 37.

Whelpdales Case, 2 Jac. com. banco, fo. 119.

IN debt brought against one joint obligor the defendant pleads *non est factum*, adjudged for the plaintiff.

1. Resolved, he may plead in abatement of the writ, but not *non est factum*, for every one is obliged in the intirety, therefore if debt be brought against both, and one is out-lawed, the other who appears shall be charged with all.

2. If a debt be avoidable by plea, he shall not plead *non est factum*.

3. If a deed be made void by statute, he shall not plead *non est factum*, but shall avoid it by plea; but if a deed by matter *ex post facto* become not his deed, he plead *non est factum*, as if one deliver a deed to deliver over to I. S. who refuseth, &c.

Longs Case, 2 Jac. banco regis, fo. 120.

EXCEPTION to the inditement of murder, the inditement was taken *infra libertatem ville de C.* and C. where the torte is done, is not said to be within the liberty. Response, that to inditements certainty to a certain intent in general sufficeth, and not to every particular intent, for that is *nimia subtilitas*, and it shall be intended that the *ville* of C. is within the liberty of C. the indictment is, *quod dedit vulnus super anteriorem partem corporis super mamillam*, where it should be *mammillam*. Resolved, that false Latine shall not quash an indictment if the word be sensible, and these two words are good Latine, also this is superfluous, for *super anteriorem partem corporis* is sufficient, and shall be intended the trunk betwixt the neck and thighs; 3. *Vulnus*, where it should be *plaga*,

over-ruled because *synonima* ; 4. *Le depthe* is not shewed, it was said that it did penetrate all his body, whereby it appeareth that it was mortal ; 5. It is said that the wound did penetrate his body, and not the bullet, this is significant enough ; 6. *Percussit* wanteth, and for this cause the indictment was quashed, for in all cases of death this ought to be, except in case of poysoning, and for this last error the outlary was reversed, and H. D. was discharged.

Saffins Case, 3 Jac. fo. 124. com. banco.

A MAN maketh a lease for years to commence after the end or determination of a former lease *in esse*. The first lease endeth, the second lessee doth not enter, but he in reversion entreth, and maketh a feoffment, and levyeth a fine with proclamations, and five years passe without entry or claim of the second lessee. If this fine be a barre was the question, and it was resolved to be a barre, for the statute of 4 H. 7. c. 24. speaks of interest, and a lease for years is an interest within the statute, so of tenant by *elegit*, &c.

De Libellis Famosis, 3 Jac. fo. 125.

A LIBEL may be made as well against a private man as against a magistrate, *non refert*, whether the libel be true, or whether the party be of good fame, or ill fame, for it inciteth all the same family, kindred, or society to revenge, and so tendeth by consequence to the effusion of blood. It was resolved in the stare-chamber, 44 Eliz. *Hallywoods Case*, that if any find a libel, and would preserve himself out of danger, if it be against a private man, the finder may either burn it, or presently deliver it to a magistrate, but if it concern a magistrate or public person, then he ought to give it to a magistrate. A libel may be as well by words, *verbis aut cantilenis*, as writings, and by pictures or ignominious signes, as gallows, &c. The punishment is by indictment, as in the star-chamber.

Palmer's Case, 8 Jac. 127. banco regis.

THE gardian in chivalry shall have the single value of the mariage of the heir without tender, otherwise the heir may defeat the lord by mariage, or goe beyond the sea, and so prevent the lord of any tender, if it were requisite.

OF THE KINGS ECCLESIASTICAL LAW.

Caudrey's Case, 33 Eliz. in trespassse, fo. 1.

THE jury found the statute of 1 *Eliz. cap. 1. and cap. 2.* and that the plaintiff was deprived, for preaching against the book of common prayer, by the bishop of London, *una cum assensu, &c.*

Resolv. 1. The deprivation was good for the first offence, because the act of 1 *Eliz.* for uniformity of common prayer, doth not abrogate 1 *Eliz.* for ecclesiastical jurisdiction, without negative words, and by an express proviso the jurisdiction of the bishop is saved.

Resolv. 2. That sentence given by the bishop by assent of his colleagues, ought to be allowed by our law.

Resolv. 3. That commissioners shall be intended subjects born, &c. *stabimur præsumptioni, &c.* Also it is found that the king authorized them, *secundum formam statuti.*

Resolv. 4. The act of 1 *Eliz.* for ecclesiastical jurisdiction was only declaratory, for the king being an absolute monarch, and head of the body politick, had plenary power to minister justice to his subjects in causes ecclesiastical and temporal. See *circumspecte agatis, 13 E. 1. and articuli cleri. 9 E. 2. reges sacro oleo uncti sunt spiritualis jurisdictionis capaces.* See there diverse judgments, laws, and acts of parliament, cited to prove the kings supremacy in causes ecclesiastical.

THE SIXTH BOOK.

WHERE SERVICES INTIRE SHALL BE APPORTIONED.

Bruertons Case, 36 Eliz. in the court of wards, fo. 1.

LORD and tenant of the three acres, by homage, fealty, a hawk and sute of court, the tenant makes a feoffement of one acre, the feoffee by the common law shall hold by all intire services, annual and casual, and the statute of *quia emptores terrarum* doth not extend to intire services, but by the statute of *Marlebr. c. 9.* the feoffees shall make but one sute, and he who doth it shall have contribution against the others, if they are severally infeoffed; otherwise if jointly.

2. Intire services shall be multiplied by the act of the tenant, and extinct by the act of the lord, as if he purchase part.

3. By act of the lord, intire service for his private benefit is extinct, otherwise if it be for the publick good, for works of charity, devotion, or administration of justice.

4. If part comes to the lord by act in law, yet the intire service remaines, except in case where contribution is to be made, for the land shall not contribute.

5. If part comes to the lord by act in law, and of himself, as by recovery in a *cessavit*, all the intire services are gone.

**WHERE THE PAROL SHALL DEMURRE FOR THE
NONAGE OF THE DEMANDANT, AND WHERE
THE TENANT SHALL HAVE HIS AGE.**

Markals case, 35 Eliz. com. banco, fo. 3.

IN a formedon in the remainder by an infant of a remainder limited to his father and his heirs, the tenant cannot pray that the parol may demur, but in a formedon in the reverter he may: in actions auncestrel, the tenant may pray that the parol may demur, because a right only descends to the infant, and the law will not suffer him to sue, for fear that he may lose for want of understanding, but in possessory actions he cannot, because then every one will put infants out of possession, and it would be mischievous if they should not regain their possession untill full age. So it is in all writs where the cause of actions happens in the time of the infant. And as to actions auncestrel, they are of two sorts. Droiturel and possessory, the first is where a right only descends from the aunces-
tor, and the infant ought to lay the explees in the aunces-
tor, and there the tenant (without plea pleaded) may pray that the parol may demur, but if the aunccestor were never in possession, (as in this case he was not,) and the infant himself is the first in whom it vests, there (without plea pleaded) he shall not pray that the parol may demurre; but if a right discend from an aunccestor who was in possession, although the action doth not discend, the tenant may pray that the parol may demurre, as if *non compos mentis* alien and dye: in actions auncestrel possessory, the parol shall not demurre without plea; but if at the common law the tenant had pleaded a feoffment of the aunces-
ter, then he may pray, &c. by the statute of *Glocester, cap. 2.* aideth that in the writs of cosinage, besaicl, and aiel, but this extends not to other actions in a formedon in the descender; where an infant recovers but a limited estate the parol shall not demur without plea; in an assize, or assize of *mordauncester*, the parol shall not demurr because the jury is to appear the first day, and try all things.

The statute of *Westm. 1. cap. 46.* age is taken away in entry upon disseisin, where fresh sute is made, but an infant shall have his age in all real actions, where he is in by discent, and the action is not founded upon his own

wrong, except in *nuper obiit* and *partitione facienda*, where both are in possession or attain, for the mischief of the death of the petty jury. The statute of *Westm. cap. 40.* ousteth the age of the vouchee in *cui, in vita*, and *survuj. in vita*, although that the tenant will answer, if the parol ought to demurr yet the court ought to award that the parol shall demurr.

Sir John Mohyns Case, 40 Eliz. in scaccar. fo. 6.

KING Edward the third, Lord Abbot of *Westminster*, mesne, and C. tenant, C. is attainted of treason, the king grants to Sir *Jo. Mo. tenendum de nobis & aliis capitalibus dominis feodi illius per servitia*, &c. the mesnalty is revived. *Obj.* 1. That the tenure shall be *per servitia inde debita*, at which time no service was due to the mesne; 2. An expresse tenure of the king is limited, and it cannot be immediately holden but of one. To the first it was answered, that there are sufficient words to renew the mesnalty, because the intention of the king appears to be so, and it is reasonable that the mesne who offended not should not suffer losse; 2. It shall be holden immediately of the abbot, and mediately of the king.

Whealers Case, 41 Eliz. in scaccar. fo. 7.

THE king grants land *tenendum* by a rose, *pro omnibus servitiis*, this is soccage in chief, and the tenure shall be by fealty and a rose, and (*pro omnibus*) is to be intended of other services which the law doth not imply.

RESOLUTIONS AND DIVERSITIES WHEN A BARRE IN ONE ACTION SHALL BE A BARRE IN ANO- THER.

Ferrers Case, 41 Eliz. com. banco, fo. 7.

IF one be barred by plea to the writ, he may have the same writ again; if by plea to the action of the writ, he may have his right action: if the plea be to the action, and he be barred by judgement upon demurrer, confession or verdict, in personal action it is a barre for ever, and in real action he is put to a writ of higher nature, as barre in assise barreth one in entry in nature of an assise, but he may have an assize of mortdauncester, &c. But barre is not perpetual if those who are barred have not the meer right, therefore the heir in tail who is barred shall have the same action, so of the successor of a parson, if he doth not pray in aid of the patron and ordinary; he who lost by default before the statute of *Westminster*, 2. cap. 4. was put to a writ of right, and if he could not have this writ, he was without remedy: in case where a writ of entry in the post lyeth now, no remedy was before the statute of *Marlebridge*, cap. 29. but a writ of right. See there divers inconveniences which insue upon the breach or alteration of the antient and fundamental rules of the common law: *interest reipublicæ ut sit finis litium.*

WHERE A WRIT SHALL BE BROUGHT BY JOURNEYS ACCOUNTS.

Spencers Case, 45 Eliz. com. banco, fo. 10.

IF a formedon abate for undue summons, the demandant may have another by journeys accompts.

1. *Resol.* If a writ abate by default of the demandant himself, he shall not have another writ by journeys accompts, otherwise it is if by default of the clerk or sheriff, as in this case: if a writ abate for non-tenure of all, he shall not have, &c. But if a præcipe abate for non-tenure of parcel, he shall have another, so if it abate for joyntenancy of part of the demandant he shall not have a new writ because he had notice, otherwise it is of the part of the tenant:

and this writ shall be alwayes betwixt the parties to the first writ, and of the same quantity of acres. A judicial writ shall never be sued by journeys accompts, because it shall never abate for form; 2. The second writ is *quasi* a continuance of the first writ, therefore all pleas which relate to the purchase of the writ shall be pleaded from the purchase of the first writ, and costs of the first writ shall be recovered. 32 E. 3. Journeys Accompts, 16. 15 dayes were allowed.

Gentlemans Case, 25 Eliz. concerning judges of courts, fo. 11.

IN the hundred courts the sutors are judges, in the court of pypowders the steward is judge; in a leet the steward is judge: in a court baron the sutors which are by the common law are judges, *rex sectatoribus curiæ, &c. vobis mandamus, &c. ad judicium reddendum, &c. procedatis*: but in redisseisin the sheriff is judge by the statute of *Merton, cap. 3.* and in the tourne.

Morrices Case, 27 Eliz. com. banco, fo. 13.

IT was adjudged, that after the act of 28 H. ca. 1. although jointenants be compellable to make partition by writ, as well as copartners, yet they may not make partition by words, as copartners may do by the common law. If two jointenants make partition by writ, the warranty remaineth, otherwise it is if it be by deed by consent,

Case of Pardon, 29 Eliz. fo. 13.

BURTON, parson of *Isbock* in *Leic.* was deprived anno, 12 El. for committing adultery, and after by the general pardon, 2 Apri. 13 El. the offence of adultery (*int. alia*) was pardoned, before the 14 of *February* then last past. And it was said that before the pardon, that *crimen adulterii præd. transivit in rem judicatam*, and therefore the sentence should remain in force; and therefore until the

sentence were reversed the deprivation was in force. But it was resolved, that *Burton* by vertue of the said pardon is become parson again, without any sentence declaring the said deprivation to be voyd : for by the pardon the adultery which was the cause of the sentence is discharged, and by consequence, all that which did stand or depend upon the same foundation is also discharged. *Vide* 20 *El. Dyer*.

A. was bound in a statute of 20 *li.* to B. B. sued execution, and the lands of A. were delivered in execution, and after B. maketh defeasance to A. by indenture, that if A. doe pay to B. 8 *li.* at a certain day, that then the statute to be voyd ; and it was adjudged that although the statute was executed, yet the defeasance of the statutes was sufficient in law to defeat as well the statute as the execution thereof ; for the statute is the foundation of all, and if that be defeated, all that is builded on the same shall be defeated also. 20 *Ass. pl. 7.* Burglary was excepted out of the general pardon of 28 *Eliz.* by that the attainder of burglary is excepted, for the offence remains after judgment, and is the foundation of it.

Arundels Case, 36 Eliz. banco regis, fo. 14.

AN inditement of murther in King street in W. and the visne from W. and it was vitious, for it ought to be from the most certain place, that is, the parish, for W. being a city, it shall be intended that it is greater then the parish, and therefore a new *venire facias* was awarded.

Treports Case, 36 Eliz. banco regis, fo. 15.

A. tenant for life, remainder in fee to B. both by deed indented, joyn in a lease to *Treport* ; the question was, whether the same shall be adjudged in law the lease of both of them or not ; and it was resolved, that it was the lease of A. during his life, and the confirmation of B. and after the death of A. it was the lease of B. and the confirmation of A. and because, the plaintiff had de-

clared of a joynt demise of A. and B. it was adjudged against the plaintiff in an *ejectione firmæ*. If tenant for life and he in remainder joyn in a lease, rendring rent, tenant for life shall have the rent during his life.

Edens Case, 37 Eliz. banco regis, fo. 16.

RIENS PASSA by letters patents shall be tryed where the land is, not where the patent beares date, for the patent is not traversed; but the effect of the issue is, whether the queen had the said land to the grant or not.

Colyers Case, 37 Eliz. banco regis, fo. 16.

ONE deviseth to his daughter for life, and after to his brother, paying 20s. to I. S. the brother had fee for the summe to be paid by him, for otherwise he may pay the 20s. and die without satisfaction; but if the payment be to be made out of the profit of the land, he shall have but for life, for there he can be at no prejudice.

Wyldes Case, 41 Eliz. banco regis, fo. 17.

A MAN deviseth lands to the husband and the wife, and to the children of their bodies; the question was, whether they have an estate for life, or an inheritance in tail. And it was resolved, that if they had children at the time of the demise made, then they had but an estate for life; but if they had no children, then they had an estate of inheritance in tail.

Sir Edward Cleeves Case, 42 Eliz. fo. 18.

A MAN is seized of three acres of land holden *in capite*, and maketh a feoffment in fee of two of them, to the use of his wife for her life; and after maketh a feoffment by deed of the third acre, to the use of such persons, and of such estate and estates as he should limit and appoint by his last will in writing; and afterwards by his last will in writing, he devised the said third acre to one in fee; and if this devise was good for all the third acre, or not, or for two parts thereof, or void for all, was the question; and it was adjudged that the devise was good; for the feoffer by his last will limited the estates according to his power reserved to him upon the feoffment, the estates should take effect by force of the feoffment, and the use is directed by the will; so as in this case the will is only directory; but if he declared his will by writing without any reference to his authority or power, as owner of the land, and to limit no use according to his power. In this case the land being holden *in capite*, the devise is good for two parts, and void for the third part. If a man make a feoffment in fee of lands *in capite*, to the use of his last will, although he devise the land with reference to the feoffment, yet the will is voyd for a third part; for a feoffment to the use of his last will, and to the use of him and his heirs is all one.

In this case when the party had conveyed two parts to the use of his wife, by his act executed, he cannot, as owner of the land, devise any part of the residue by his will, and therefore because he hath not an election, as in the case put before, whether to limit according to his power, or devise the same as owner of the land, for in the case at barr as owner of the land, (having conveyed two parts to the use of his wife,) he cannot make any devise. The devise of necessity must inure a limitation of the use, otherwise the devise should be altogether voyd.

Packmans Case, 37 Eliz. banco regis, fo. 19.

WILSON brought an action upon the case upon a trover against *Packman*. The case was thus; a man dyed intestate, and the ordinary committed the administration to a stranger, and after the next of kindred of the decedent sued out a citation in the court christian, to have it repealed, and (*pendente lite*) the administrator, to defeat the plaintiff selleth the goods of the decedent to the defendant, and after the letters of administration were revoked by sentence, and the first sentence annulled & made voyd, and the administration granted to the plaintiff. And it was resolved, that the action did not lye; and in this case the diversitie was holden between a sute by citation for to countermand or revoke the former administration, and an appeal, which is alwayes a reserving of a former sentence, for an appeal doth suspend the former sentence, otherwise of a citation. And in this case because the first administrator had the absolute property of the goods in him, without question he may sell them to whom he will, and although the administration be revoked afterwards, yet that cannot defeat the sale. But if the sale or gift be by covine, it is voyd against creditors by the statute of 13 *El.* but it is good against a second administrator. And if an administrator wast the goods, and afterwards the administration is granted to another, yet every debtor shall charge him in debt. An administration may be granted upon condition, and whatsoever the administrator doth before the condition broken, is good.

Gregories Case, 38 Eliz. banco regis, fo. 20.

VERBA æquivoca & in dubio posita, intelliguntur in digniori & potentiore sensu, secundum excellentiam, as if the speech be or writing of J. S. generally it shall be intended of the father, where the father and sonne are both of a name; and if it be of two brothers both of a name, it shall be intended of the eldest, for these are more worthy; so where the statute of 4 & 5 *Phil. & Ma.* speaketh in any court of record, it shall be intended of the four courts at *Westminster*, because the kings attorney is attendant there.

Michelbornes Case, 38 Eliz. banco regis, fo. 21.

THE court of marshalsea doth only hold plea of actions of trespass within the verge, if the one of the parties be of the kings houshold, and in contracts and covenants, where both parties are of the kings houshold, and of none other actions, nor persons, by act of *Articuli super charta*, 28 E. 1.

Butler and Goodalls Case, 40 El. banco regis, fo. 22.

IT was resolved upon the statute of 21 H. 8. that a parson of a church ought to stay and be commorant upon his rectory (viz.) upon the parsonage-house, and not in any other house, although it be within the parish, but lawful imprisonment, without coveine, is a good excuse of non-residence: also if there be no parsonage-house, for *impotentia excusat legem*; also sicknesse without fraud, if the patient remove by advice of his counsel in physick, *bona fide*, for better air, and recovery of his health.

Ambrosia Gorges Case, 40 Eliz. fo. 22. in cur. wardorum.

IT was resolved that the father shall have the wardship of his daughter and heir apparent, so long as she continueth his heir apparent; but when the father hath issue a sonne, then she shall be in ward to the queen; for then he is heir apparent, and not the daughter. *Ambrosia* was daughter of Sir *Arthur Gorge*, by *Douglas*, daughter and heir of Vicount *Bindon*, and was married to *Francis Gorge*, which *Francis* dyed, when *Ambrosia* was of ten years of age. It was resolved also, that the queen, notwithstanding the said mariage, should have the wardship of the said *Ambrosia*; for it was not a compleat mariage, because to every marriage there ought to be a consent, for *consensus non concubitus facis matrimonium*, & *consentire non possunt ante annos nobiles*, and upon conference had with the civilians, it was agreed after such a mariage, if the husband and the wife marry again, it shall not be counted bigamie, and 30 E. 1. tit. *Gard.* 156. if the ancestor marry

his heir *infra annos nobiles*, and die, the lord shall recover the body of the infant, because the heir may disagree; it was agreed that the grandfather shall not have the wardship of the son within age, the father being dead in his life time.

Marquess of Winchester his case, 41 Eliz. fo. 23. in banco regis.

BY the law it is not sufficient that the testator be of memory (when he makes his will) to answer to ordinary and usual questions, but he ought to have a disposing memory, so as he is able to make disposition of his lands with understanding and reason. And this is such a memory, which is called safe and perfect memory, otherwise a prohibition lyeth at the common law generally, to stay all the proceedings in the spiritual court, as the probate of the will, &c. until this suggestion be tryed at the common law.

Reads Case, 42 Eliz. banco regis, fo. 25.

IN trespassse the defendant makes title, for that A. W. was seised in fee, and leased to him, the plaintiff maketh title by descent, and traverseth the lease, and good, for it may be true, that A. W. was seised, and yet that a descent was cast to the plaintiff, therefore the lease is most material to be traversed.

Helyars Case, 41 Eliz. banco regis, fo. 25.

IN a replevin the defendant avoweth by grant of a term by I. A. to S. from whom he claimeth, the plaintiff pleads in barre that I. A. married T. who by a former deed granted the term to the plaintiff, and traverseth the grant made to S. and vitious, for he who claimeth by the first assignment shall not traverse the second, but he who claims by the second shall traverse the first. But the first feoffee shall traverse the last feoffment, and the last feoffee shall not traverse the first feoffment, because fee may be gained by disseisin after the first feoffment, but a lease for years cannot,

Ruddocks Case, 41 Eliz. fo. 25. banco regis.

IN replevin against six, the plaintiff recovers, the defendants bring error, the plaintiff pleads the release of one of them, not good; where diverse are to recover a personal thing, the release or default of one barrs all, but not where they are to discharge themselves of a personality, if they are compelled to joyn, as in error on attain, otherwise in outlary, because not compellable to joyn, for where they are to discharge themselves, they have no joint interest, and although they shall have their damages again, it shall be intended that they paid them of their several goods, otherwise it may be doubted if execution had been made of goods which they have joyntly.

Sharps Case, 42 Eliz. fo. 26. com. banco.

IF a man make a feoffment in fee, or a lease for life, and say to the feoffee (being either on the lands, or within the view) *enter into this land and enjoy the same*, according to this deed, &c. this is good livery; but the delivery of the deed upon the lands without any further ceremony, or saying, doth not amount to a livery, *Throughgoods Case, 9 Jacobi*, in ninth book. The actual delivery of a writing, sealed to the party without any words, is a good livery, but not a livery of seisin, although the party be upon the ground.

If I deliver a deed unto the feoffee or lessee of the messuage, mentioned in the deed in the name of seisin of the said messuage, and of all the lands, tenements, &c. in the same contained, or other such like words, without any ceremony, or act done, this is a good seisin.

The Case of Souldiers, 43 Eliz. fo. 27.

THE statute of 7 H. 7. cap. 1. and 3 H. 8. cap. 5. against souldiers who run away, are acts perpetual, for the word king includeth all his succession, and a gift to the king inureth to his successors.

Vicount Montagues Case, 43 Eliz. in scaccar. fo. 28.

VICOUNT M. with license to the K. suffers a recovery to B. and D. to uses with power of revocation and limiting of new, and revokes and limits new uses, the king shall have no fine for alienation.

2. Resolved, if the king doth license to alien to one, and alienation is made to the use of another, the king shall not have a fine, for although that the king was not informed of his tenant, yet the use is executed by the statute of 27 H. 8. which can do no wrong, and the proviso in the statute, that a fine shall be paid for executing of uses, is to be intended of uses raised by covenant, or declared upon a fine, feoffment, &c. when no license of alienation is obtained.

2. Although that by revocation, and new limitation of uses, the tenant of the king be altered, yet no fine is due, because all ariseth out of the estate of B. and D. which was made with license.

Greenes Case, 44 Eliz. banco regis, fo. 29.

TENANT for life of a mannor to which an advowson is appendant, the remainder in fee to I. S. presenteth one, who at the sute of the tenant for life is deprived for not reading the articles; but no notice is given to the patron, the queen by lapse presents the defendant, tenant for life, and his incumbent dyc, he in the remainder presents the plaintiff *Green*, who recovereth.

1. Resolv. Although the patron were party to the sute, and so had notice, yet lapse shall not incurr without notice given by the ordinary, as the statute speaks, and the notice ought to be special that he did not read the articles, and therefore was deprived, and general notice is not sufficient.

2. The church is void, *ipso facto*, by the statute of 13 *Eliz.* without deprivation.

3. If the queen present *ratione lapsus*, where she is patron, this is voyd, *à fortiori*, when she had no title at all.

4. The patron is not put to a *quare impedit*, by presenting him who read not the articles, nor by collation, but by collation of him who had right to collate, the patron is put out of possession.

5. The queen may be put out of possession of an advowson, because it is transitory, but she cannot be put to a writ of right of advowson, for none can gain the inheritance from her by wrong.

Boothies Case, 3 Jac. com. banco, fo. 31.

THE condition of an obligation is to deliver an obligation to the obligee, and to acknowledge satisfaction, it must be done in convenient time, for acts transitory to be done to the obligee, although a place be appointed, shall be done in convenient time, and acts of their nature local ought to be performed in convenient time, if concurrence of the obligor and obligee be not requisite. Also here the delivery of the bond being transitory, and the acknowledging satisfaction such an act as may be performed in the absence of the obligee, they ought to be done in convenient time, without request: but if the act be local, and their concurrence necessary; the obligor hath time, during his life, if not hastened by request. If the concurrence of the obligor and a stranger be necessary, it ought to be done in convenient time, if concurrence of the obligee and a stranger, it ought to be hastened by request: and alwayes, if the act to be done is not for the benefit of the obligee, but a labour to the obligor, or a stranger, there he had time during his life.

Fitz-Williams Case, 2 Jac. banco regis, fo. 32.

BARON and feme tenants for life, and to the heirs of the body of the baron, the baron sole is vouched; in a common recovery the tayl is barred. *Copledicks Case, 3. Report 2. Resolv.* If the tenant in tail suffer a recovery to his own use, the remainder to his wife with diverse remainders over, with power of revocation and limitation of new uses by any such writing, he revoketh all the remainders except that to his wife; and by the same deed limits new uses; this is good, for by any such writing shall be intended the same or any such, and it may be by the same deed; for, first it takes effect as a revocation. 2. By limitation of new uses, and there are not more instances then one in it. See there *Leaper and Wroths Case*, cited 20 *EL.* to prove that powers, whereby the interest of strangers shall be changed, shall be taken strictly, as a power to make leases for twenty-one years, he cannot make a lease for twenty-one years to commence *in futuro*.

The Bishop of Bathes Case, 3 Jac. com. banco, fo. 35.

THE B. 18 *H. 8.* leaseth to E. and R. for sixty years, proviso, if they dye within the term, that the B. and his successor shall reenter. E. dyes, the B. dyes, the successor leases to C. *cum post sive per mortem, &c. prædict. acciderit vacare*, for sixty years with confirmation. R. dyeth. *Resolv.* Every lease ought to have a certain beginning, and the continuance ought also to be certain, either by expresse number of years, or by reference to an expresse certainty, or where a lease may be reduced to certainty by matter *ex post facto*. Agreed, the second lease vests presently in point of interest, to take effect in possession of the end of the first term if by none of the accidents the first lease become voyd in the mean time, and then the lease shall commence at the first accident which doth happen, and the lessee hath no election.

The Dean and Chapter of Worcesters Case, 3 Jac. fo. 37.

THE D. and Ch. seised of a manor in fee, in which were copy-holds grantable for three lives, for 8s. 8d. payable quarterly, and herriotable, grant a copy-hold for the life of three, reserving the old rent half yearly, this is not void by 13 *Eliz. cap. 1.* Resolved, the grant of a copy-hold for the life of three is good, for although there may be an occupancy, yet it is not inconvenient, for an occupant shall be punished in waste; 2. Grant of a copy-hold is a demise by the intent of the statute, for in law it is a lease at will; 3. The omission of herriot doth not make it void, because the annual rent is reserved; 4. It is sufficient that the yearly rent be reserved twice in the year, for the statute saith yearly, which maketh a difference between this case and the Lord *Mountjoyes Case*, in the fifth report.

Bellamy's Case, 3 Jac. com. banco, fo. 38.

A LEASE upon condition that the lessee shall not alien without license, assignee of the lessee pleads that the assignment was with license, and shewed not forth the deed of license; 1. Because he did not claim by it; 2. Because the license was, *ex provisione hominis*, and not *ex institutione legis*; 3. Because it was executed and good.

Henry Finches Case, 3 Jac. banco regis, fo. 39.

A GRANT of a rent charge out of divers manors, &c. in the parishes of E. and W. *aut alibi dictis maneriis spectantibus*. and out of lands which is not parcel of any of the manors, these are not charged with the distresse, for *alibi* doth not charge more land than is parcel of those manors, but all parcels of the said manors out of the said parishes.

Sir Anthony Mildmay's Case, 3 Jac. banco regis, fo. 40.

1. RESOLVED, a perpetuity is against the rules and policy of the common law; 2. It is impossible that an estate tail shall cease before that tenant in tail dyes with-

out issue, and an estate cannot be made to continue as to one and determine as to another, except by statute; 3. A gift in tail upon condition that he shall not suffer a common recovery, is voyd, because he had power by the law; 4. It is a voyd saying, that his estate shall cease, if he goe about, &c. for, *non officit conatus nisi sequatur effectus*; Also many ambiguities will arise thereupon, because the law doth not define it, and it is so uncertain that it is not traversable.

Blakes Case, 3 Jac. com. banco, fo. 44.

AN accord with satisfaction is a good barre in a writ of covenant, because the duty accrueth not meerly by the deed, but by a tort subsequent, together with the deed, and it is a good barre in an attaint, because this is not founded upon the record only, but upon the false oath also. In all cases where an arbitrament is a good plea, an accord with satisfaction is also, and so generally in all actions where damages only are to be recovered.

Higgins Case, 3 Jac. com. banco, fo. 45.

IF a man have judgement upon an obligation, so long as this judgement is in force, he may not have a new action upon the same obligation. For, *interest reipublicæ ut sit finis litium & infinitum in jure reprobatur*. A statute staple is but an obligation recorded, and one obligation cannot drown another, although they be both for one debt, and the obligee may chose upon whether he will bring his action. 11 H. 4. and 2 Jac. *Sir William Cornwalles Case*, and *Branthwaytes Case*, and in every judgment the defendant is amerced, and so he shall be amerced, in *infinitum*.

Dowdales Case, 3 Jac. com. banco, fo. 47.

IN debt against an executor, the defendant pleads fully administred; the plaintiff saith that he had assets at E.; the jury found assets in *Ireland*.

1. Resol. when the place is material the poynt in issue cannot be found in another place; 2. Where the place is named but for conformity, assets may be found in

another county; 3. In a general issue, the jury shall find all material local things in another county; 4. The jury by a mean shall try local things in another county, as a release in a forein country, the jurors shall asseſſe damages for the profits of the land in the other county. *Multa conceduntur per obliquum quæ non*, &c. but in case of felony, the tryal shall be where the offence was done; 5. The finding of assets is the substance, and that it is in *Ireland* is surplusage. A thing done beyond the sea shall be tryed here, if the foundation of the action be here.

Boswells Case, 3 Jac. banco regis, fo. 49.

IN a *quare impedit*, judgment was given to remove the incumbent of the queen, not party to the writ, who was presented pending the writ. Resol. that by the common law, by admission and institution, the usurper gains the inheritance of the advowson, without regard of the nonage of the patron, because he is in by judicial act, and the bishop shall be supposed not to do wrong to the patron, and the incumbent shall not be disturbed to exercise his function, but the king shall have a *quare impedit* at the common law. Collation doth not put him who hath right to present out of possession, but if one have right to collate it doth. An infant by act of *W. 2. c. 5.* shall have a *quare impedit*, if a man usurp upon an infant who had a mannor, to which, &c. by descent, who at full age infeoffeth B. the church voideth, &c. by the usurpation the infant was out of possession, and his right passed not, and seems the infant is without remedy: if a clerk commeth in by course of law, this gaineth not the inheritance against the right patron, who was not party to the writ. The king shall not recover damages by this statute, for he is not within the first branch, *si tempus semestre transierit*, nor within the second branch, for that depends upon the first, yet he shall count to damages. An incumbent shall not be moved if he be not named in the writ, and if he be not admitted, &c. pending the writ, and lapse shall not incur if the bishop be named in the writ, otherwise if he be not: if he who is presented pending the writ, be in by rightfull patron or not, yet he who recovereth in a *quare impedit* shall have a general writ to the biskop, which he must execute of necessity, and after that, the parties may try their titles as the law shall determine.

*Countess of Rutlands Case, in the star-chamber, 3 Jac.
fo. 53.*

THAT the person of a countess or baroness may not be arested for debt or trespasse, for although in respect of their sex they may not sit in the parliament, yet they are peers of the realm, and shall be tryed by their peers, *stat. 20 H. 6.* Peers of the realm may not be sworn in any inquest; a countess in marrying with a husband, doth lose her name of a countess.

If a baroness, &c. by mariage, mary again under the nobility, she loseth her dignity, but if she be noble by birth, or descent, yet whomsoever she maryeth, she remaineth noble; for birth right is character *indelebilis*, and that which is gained by mariage may also be lost by mariage.

A sheriff ought not to dispute the authority of courts, but he ought to execute the writs to him directed, for thereunto be they sworn. Serjeant at mace, upon a *cap. ad satisfaciendum*, came to the said countesse in *Cheapside*, being in her coach, and touched her body with the mace, and said, *I arrest you, madam, at the sute of S.* and those were all the words that were used, and thereupon compelled the coach-man to carry her unto the counter-gate in *Woodstreet*, and the sheriff took her into his house. In this case it was resolved, that the sheriff, bayliff, &c. upon the arrest ought to shew at whose sute, out of what court, for what cause it is, and when the processe is returnable, and that this general arrest of the countesse cannot be said that it was by force of the said writ of execution, and that this arrest was of the serjeants own head, without warrant, and against law, and that the said countess was falsly imprisoned, but she remained in the sheriffs custody 7 or 8 dayes, until she paid the debt, but because the arrest was by a feigned action, entred in the counter, the serjeants were sentenced.

The Lord Chandos Case, 4 Jac. fo. 53.

THE king grants to B. in tail, and in consideration of the surrender of the letters patents, by force whereof the king is seised in fee, granteth to him and his wife, and to the heirs of B. the reversion passeth, for the recital that the king was seised in fee was but the collection of the king, and no part of the consideration or suggestion of the party; and when the king grants land in possession, if he had but a reversion, this shall passe, for he is not deceived because lesse passes than he intended.

Bredimans Case, 4 Jac. com. banco, fo. 57.

A MAN deviseth a rent for life out of a mannor, and he deviseth the mannor for years, the termor enters and pays the rent; after the term the devisee brings an assize against the terretenant. *Resolv.* Payment by lessee for years of the rent giveth no seisin to have an assize; 1. In respect of the imbecility of his estate; 2. He cannot give seisin because he had not seisin, and therefore a præcipe lyeth not against him, because he cannot render seisin; but he may take seisin to the use of him in the freehold. A disseisor may give seisin of a rent secke, because he hath a freehold, and it is lawful; 3. A rent secke is *cactus & siccus*, therefore it behoveth the first payment (which giveth life unto it) shall be made by a tenant of the freehold, and in this case being created by devise, an annuity lyeth not thereupon, otherwise if it be by grant, and tenant of the freehold ought to attorn to a grant of such a rent over, therefore he shall give seisin: but seisin by a bayliff is good, if seisin were had before within sixty years, and seisin given by tenant at will is good, but it ought to be pleaded as payment by the lessor himself. If the king hath rent out of a ville to be paid by all the inhabitants; seisin alleged in general, without naming any, is good.

Gatewards Case, 4 Jac. in com. banco, fo. 60.

TO claim common *ratione commorantia* & *residen. in villa de B.* is not good ; for no man may have interest in common in respect of a messuage wherein he hath no interest ; for custome should alwayes extend to that which hath certainty & continuance, and without question tenant in fee simple ought to prescribe in his own name, and tenant for life or years by *elegit*, at will, &c. in the name of him that hath the fee, and he that hath no interest cannot have any common, and none that hath any interest, although it be but at will, and ought to have common, but by good pleading he may enjoy the same.

No improvement might be made in any wastes, if this custome (*viz.*) in respect of habitation, and commorance should be allowed, for tenants for life or years at will, by *elegit*, by statute, &c. of the houses of the lord, should have common in the wastes of the lord, if this prescription were allowed, which were inconvenient. A custome that every inhabitant in B. shall have a way over such grounds, either to the church or market, &c. it is a good custome, for that is only easement, and no profit, and a way or passage may well *sequi personam*; the lord cannot claim common in his own soyl.

A diversity was taken and agreed upon between a prescription and a custome, a prescription is alwaies alleged in the person, and a custome ought alwaies to be alleged in the land, for every prescription ought to have by common intendment a lawful commencement ; but otherwise of a custome, for that ought to be reasonable ; and *ex certa causa rationabili usitata*, as *Littleton* saith ; but it needeth not to have intendment of a lawfull commencement, as custome to have land devisable, or of the nature of gavelkind, or borrough English. These and such like customes are reasonable, but by common intendment, these cannot have lawfull commencement by grant, or act, or agreement, but only by parliament ; and the custome in the case at bar was repugnant, for it was alleged that the custome of the town was, that every inhabitant had used to have common within a place in the town of H. which was another town.

Catesbyes Case, 4 Jac. fo. 62.

SIX months being half a year (*semestre*) is given to the patron of an advowson to present, and according to the kalender, and not after 28 daies to a month; and the statute saith, *si tempus semestre non transierit adjudicentur damna ad valorem, &c. per dimidium anni*; and being ambiguous, it shall be construed for the benefit of the patron.

Sir Moyle Finches Case, 4 Jac. com. banco, fo. 63.

THE Lady M. tenant for life of the mannor of B. the remainder in fee to the Lady Finch, she and S. her husband and D. levied a fine to one of the demesns, who grants and renders to D. for 50 years, the reversion to S. and his wife, and her heirs, with proviso in the deeds which directed the fine that the reversioner shall enter and hold courts; and it was averred that this was known by the name of the mannor of B. D. maketh his son of three years of age executor, and administration was committed to R. T. S. and his wife levy a fine of all the lands of the wife in K. except the mannor of B. to the use of the feme for life, the remainder to Sir M. F. R. F. demiseth to P. L. for ten years, dame M. dyeth, P. L. entreth, by vertue of a power of revocation and limitation of new uses, S. with the assent, of the Lady F. his wife, limiteth the uses to one who ousteth P. L. and maketh a feoffment to the use of the Lady F. for life, the remainder to H. F. in tail, P. L. re-enters, dame dyeth, H. F. for rent arrear distraineth.

1. *Resol.* By the grant and tender of the demesns the mannor is destroyed, because in an instant the services and demesns are severed by act of the party; but otherwise it is, if by act in law, as upon partition: so it is of an advowson appendant, &c. and upon partition many mannors may be made of one, but not by the act of the party; 2. B. is excepted by the name of a mannor; 1. Because the intent of the parties is so; 2. Exception of misnomer shall not be favoured in law; 3. It is sufficient in law in many cases, that a thing be reputed as it is named, as if a remainder be limited to a bastard by the name of sonne of J. S. and as to that was objected, that this reputation is not time out of mind, this needs not, if it be of convenient

time as this was, for it was a mannor *re vera* before to levy a fine, and continue the name after, so that this reputation is stronger having such a ground, and reputation serveth in writs amicable, although not in adversary.

3. The lease made by the administrator *durante minori ætate*, is good, because the administration is general, and not special to the benefit of the infant, but howsoever this is good during the administration.

4. P. L. in the life of the lady M. had but *interesse termini*, and so that attornment cannot be in his life, but after the death of the La. Mo. by entry of the lessee the reversion is in S. and his wife without attornment, because attornment needs not, because the reversion is settled, and he hath no means to compel, &c. otherwise it is where an attornment may be had: and although that P. L. lessee of a lessee of part cannot make an express attornment, yet his reentry shall be attornment in law, so he who hath *interesse termini*, may make a surrender in law, but no expresse surrender, and a man of *non sana memoriæ* may make an attornment in law, but not any expresse attornment.

The Lord Darcies Case, 4 Jac. com. banco, fo. 71.

TENDER is not necessary to have the single value of the heir male or female; but the heir female shall not forfeit the double value, because the statute of *Merton* is *si se maritaverit* at the age of 14 years, &c. at which time the heir female is out of ward: and where by the statute of *Westmin.* 1. cap. 22. it is provided that the lord shall have two years to make a tender, it giveth not the double value, but if he waive the two years, he shall have the value without tender; *quia de mero jure*, &c.

Burrells Case, 5 Jac. com. banco, fo. 72.

IF the father make a lease by fraud and dyes, the sonne sells the land knowing or not knowing of it, the vendee shall avoid it; 2. If the father makes a lease to the sonne, who assigneth it over by fraud, the father dyes, the sonne sells the land, the vendee shall avoid it.

Sir Drue Druries Case, 5 fac. cur. wardor. fo. 73.

E. 1. granted to the town of Y. *quod omnes de villa oriundi licet terras, &c. extra libertatem villæ, &c. tenuerunt in capite, se maritare possint juxta libertatis villæ prædictæ*: R. D. dyed seised of a house parcel of a monasterie, dissolved in the time of H. 8. holden *in capite*, the king grants the wardship of his son to the plaintiff, and makes the ward knight, the plaintiff brings a *valore maritagii*.

The charter doth not discharge the defendant; 1. Because it is *juxta libertates villæ prædictæ*. and the liberties are not shewed; 2. This charter cannot extend to a tenure created in the time of H. 8.; 3. It is not shewed that the defendant was born within the town.

Resol. If the heir in ward be made a knight, he is out of ward for his body, because by intendment he is able to do knights service, otherwise if made a nobleman.

2. By the death of the tenant the value of the marriage is vested in the lord, and cannot be divested by knighthood, &c.

3. If he be knighted in the life of his ancestors, he shall not be in ward at all.

4. If making of the heir in ward knight shall divest the value, it will be prejudicial to the subject, and to the king, for none will buy their wardships.

5. After tender and refusal if the heir be made knight, and marry, he shall not forfeit the double value, because he is out of ward, but immediately the lord shall have a writ *de valore maritagii*.

This was the last case that Sir John Popham, Chief Justice of England, &c. ever argued.

Sir George Cursons Case, 5 Jac. cur. wardor. fo. 76.

SIR W. L. seised of a reversion expectant upon tail, (made to his son,) of land in *capite*, covenants to stand seised to the use of his neece, the son dyeth, the king shall not have premier seisin.

1. *Resol.* It was collusion apparent within the statute of *Marlebr. cap. 6.* to infeoff the heir apparent; and if he infeoff others upon collusion averrable, but no averment shall be where the remainder or reversion is left in a stranger, or upon a devise.

2. Or otherwise to dispose in the statute of 32 *H. 8.* have relation to wills only, for before the statute every man might dispose of his lands by act executed.

3. The clause in the said statute which saveth premier seisin to the king, hath relation only to acts executed, for the king shall have without that premier seisin of the third part not devised, but without that he shall not have it of any part conveyed by act executed.

4. If the grandfather convey land to the son, living the father, this is out of the statute, otherwise if the father be dead: and so a gift to a collaterall kinsman, who is not heir apparent, is out of the statute, for none will (by intendment) dis-inherit his heir to defeat the king of his wardship, or primer seisin, and so is the experience of the court of wards.

Bullens Case, 5 Jac. com. banco, fo. 78.

THE lord may have a certain sum *pro certo leto*, for it shall be intended it was granted at the first by purchase of the leet for the ease of the tenants, and in consideration of the lords claiming of it at his own coasts every eyr: the issue was, if the plaintiff was a chief pledge, and by special verdict he was found a resiant, and certified by the chief pledges to be a chief pledge, and was amerced for his default. It seemeth he was not, *sed materia prædicta consopita fuit in arbitrio.* See 30 E. 3. 23. of frank pledges.

Lord Abergavenies Case, 5 Jac. com. banco, fo. 79.

A judgement in an action of debt is had against jointenant for life who afterwards releaseth to his companion all the right, &c. yet that moytie is liable to the judgement, and so it is of a rent-charge during the life of the releasor.

Sir Edward Phyttons Case, 5 Jac. com. banco, fo. 80.

EXECUTORS may take benefit of the kings generall pardon, by which is enacted that all subjects of the king, their heirs, successors, executors and administrators, shall be acquitted and discharged of all offences, contempts, &c. and that shall be expounded most beneficially for the subject. And further doth give and grant all goods, chattels, debts, &c. forfeited; and prohibiteth any clerk to make out any writ, &c. Provided that every clerk may make forth *cap. ut.* at the sute of the plaintiff against persons outlawed, to the intent to compel them to answer; and that the party shall sue forth a *scir. fa.* before the pardon in that behalf shall be allowed; which is as much to say, having regard only to the plaintiff; but in regard of the king, it is an absolute pardon, and grant of his goods, and he is a person inabled against the king, but not against the party plaintiff. And every person by himself or his attorney, may plead this act for discharge: executors shall have restitution upon the statute 21 H. 8. Also administrators shall have a writ of error upon the statute 27 El. as was adjudged in the *Lord Mordants Case, 36 El.* And yet these statutes speak only of the party, and not of the executors or administrators, and because no writ can be against executors, they may plead it without processe.

THE SEVENTH BOOK.

POSTNATI.

Calvins Case, 6 Jac. banco regis, fo. 1.

R. C. by his gardian bringeth an assize, the defendants say, the plaintiff ought not to be answered, *quia est alienigena natus 50. Novembris, anno domini regis Angliæ, &c. tertio apud E. infra regnum Scotiæ ac infra ligeanciam domini regis regni sui S. ac extra ligeanciam regni sui Ang. &c.* the plaintiff demurreth.

The case was adjourned into the exchequer chamber, and was argued by two justices every day, and by the chancellor, and resolved by the chancellor, and all the justices, (except *Wamsley* and *Foster*,) that the plaintiff ought to be answered.

For these six demonstrative conclusions drawn from the law of nature, the law of the land, reasons of state, and authorities of records and book cases.

1. Every one that is an alien by birth, may be, or might have been, an enemy by accident; but C. could never be an enemy by any accident whatsoever; *ergo*, no alien by birth.

2. Whosoever are born under one natural ligeance, due by the law of nature to one sovereign, are natural born subjects; but C. was born under one, &c. *ergo*, a natural subject.

3. Whosoever is born within the kings protection, is no alien; but C. was born under, &c. *ergo*, he is no alien.

4. Every stranger born, must, at his birth, be either *amicus* or *inimicus*; but C. at his birth could neither be *amicus* nor *inimicus*, because he was *subditus*; *ergo*, no stranger born.

5. Whatsoever is due by the law of man may be altered; but natural ligeance of the subject to the sovereign cannot be altered; *ergo*, not due by mans law.

Lastly, whosoever at his birth cannot be an alien to the king of E. cannot be an alien to any of his subjects of E. but C. at his birth could be no alien to the king of E. *ergo*, he cannot be an alien to any of the subjects of E. the major and minor both be *propositiones perspicue veræ*

and although *alienigena dicitur ab aliena gente*: yet that is all one as *aliena ligeantia*, and arguments drawn from etymologies are feeble, for *sapenumero ubi proprietas verborum attenditur sensus veritatis amittitur*, yet when they agree with law, judges may use them¹ for ornament, and divers inconveniences would follow, if the plea against the plaintiff should be allowed: for first, it maketh leageance locall, whereupon should follow, first, that leageance which is universal, should be confined within local limits; 2. That the subject should not be bound to serve the king in peace or in war out of those bounds; 3. It should illegitimate many, which were born in *Gascoyn, Guyen, Normandy*, &c. and divers others of his majesties dominions, whilst the same were in actual obedience. And lastly, this strange and new devised plea inclineth too much to countenance that dangerous and desperate error of the *Spencers*, (*viz.*) that the homage and oath of leageance, was more by reason of the kings crown (that is, of his politique capacity) than by reason of the person of the king, which was condemned by two parliaments, one in the reign of *E. 2.* called *Exilium Hugonis le Spencer*; and the other in *1 E. 3. cap. 1.* No one opinion in all our books is against this judgment. The lord chancellour and twelve of the judges, concurred in one opinion herein, and not in any remembrance so honourable and intelligent an auditory as was at this case.

Buhwers Case, 27 Eliz. fo. 1.

H. recovered against the plaintiff in the common place, and dyeth; the defendant in the name of H. outlawed the plaintiff, who brings an action of the case in N. where the first action was brought and recovered, for there was the visible torte; when matter in one county dependeth upon matter in another county, the plaintiff may choose in which county to bring his action, (except that the defendant upon general issue pleaded, may be prejudiced of his trial,) as if two conspire in one county to endite one in another county, and doe it, an action may be brought in either, but if he be indited, but not by them, there it shall be brought where the conspiracy was. If manasse be made in E. whereby my tenants recede into L. an action shall be brought in E. if an action be founded upon two things,

material and traversable in two several counties, an action may be brought in any of them. An annuity granted in one county to be paid in another, the action shall be brought where the grant was, he who is robbed may have an appeal of felony, in every county where the goods came, but of robbery where the fact was done only. A lease for years in one county, of land in another, debt shall be brought where the lease was made, and waste where the land lyeth; every action which concerneth the life of a man shall be brought where the offence is committed; Every issue which ariseth upon an action in which land shall be recovered, shall be brought where the land lyeth, as in right of ward of land or body, or intrusion of ward, and forfeiture of marriage, and *valore maritagii*, and *quare impedit*, but ravishment of ward, where the ravishment was, and a *quare non admisit* where the refusal was, before the statute of 27 R. 2. c. 10. And action for land in diverse counties, or for common in one county appendant to land in another county, shall be brought by several writs in both counties, but now, in *confinio comitatum*: a *per quæ servitia* shall be brought where the note of the fine is levied.

Sir Miles Corbets Case, 27 Eliz. in scaccar. fo. 5.

RESOL. that the special manner of common in *Norf.* called *Shacke*, to be taken in arable land after harvest until sowing begin, is good. Resol. also if in D. there are fifty acres, and in S. 100l. who ought to intercommon for vicinage, D. cannot put in more in their common than it will depasture, and so to escape reciprocally, for the original cause of this common was only to prevent sutes in champion countries.

CASES UPON THE STATUTE OF 13 E. 1. OF
WINCHESTER, UPON HUE AND CRY.*Sendills Case, 17 Eliz. in com. banco, fo. 6.*

A ROBBERY for which the hundred must answer by force of the said statute, is to be done openly, so as the country may take notice thereof themselves ; but a robbery done secretly in the house, the country cannot take notice thereof ; for every one may keep his house as strong as he will at his perill ; for it was adjudged in *Ashpoles Case*, that the party robbed needed not to give notice thereof to the country ; for it may be that the party robbed was bound or maimed, &c. so as he could not make hue and cry to give notice. A robbery was done in *January*, presently after the sun setting during day-light ; and it was adjudged, that the hundred should answer for the same ; for it was a convenient time for men to travel, or to be about their businesse. One was killed in the evening and escaped, and by the common law the town was amerced, for that was accounted in law parcel of the day, and not of the night. But by the statute of 27 *El. ca. 13.* none shall have action upon the said statute, except the party robbed, so soon as he may give notice of the same to any of the inhabitants of any village, town or hamlet, next to the place where the robbery was done, and if they in pursute apprehend any of the offenders, that will excuse the town.

Milbornes Case, 29 Eliz. in com. banco, fo. 6.

A ROBBERY was done in the morning *ante lucem*, the hundred shall not be charged, *cum quis felonice occisus fuit per diem, nisi felo captus fuit tota villata illa amercietur.*

The Earl of Bedfords Case, 29 Eliz. fo. 7.

1. *Resol.* If tenant in tail make a voydable lease for years, and dyeth, his heir in ward to the king, or other lord, the lord shall avoyd this lease ; but if an infant make a feoffment, the lord by escheat shall not avoyd it, but a gardian shall, because he doth it in right of the infant.

2. This avoydance is but during the interest of the lord, for afterwards the heir may make it good ; but if he who hath a particular estate avoydeth an act in all, after his interest determined, it shall not be made good ; as if a feme be indowed of an appropriation, and her clerk inducted, the appropriation is defeated for ever ; so if a feme covert (as a feme sole) levy a fine, and the baron enters, and dyeth, the conusee shall not have the land, for the estate is wholly defeated.

Ughtreds Case, 33 Eliz. fo. 9.

THE M. of W. granted the captainship of a fort to the plaintiff, and for exercising of the said office and for finding a master gunner, and six souldiers, granted to him an annuity of 32 *li. per annum*, the plaintiff brings an annuity.

1. Except. It doth not appear by the count that the M. had power to grant this office, *non allocatur*.

2. The plaintiff doth not averre the exercising of the said office ; *non allocatur*, for if he had not used it, that shall come in on the other part, because this is a condition subsequent, and not precedent, but if one be to have a thing in consideration of an act to be done by him, there he must shew the performance, because that amounts to a condition precedent, as in debt for salary, but if each party had equal remedy, one for the money, and the other for the act to be done, there the count shall be without shewing the performance, as if one covenant to serve, &c. and the other covenants to give money, &c. But although that an interest vested is to be devested by non feaseance, if it appear to the court that an action is not maintainable without the doing of it, there the doing of it must be averred ; as if an abbot sole grants an annuity to J. S. *pro concilio*, &c. in action brought against the successor, he must averr that he had given counsel, &c. to the use of the house, otherwise if against the grantor.

Englefields Case, 34 Eliz. in scaccar. fo. 11.

SIR F. E. covenanted to stand seised to the use of himself for life, the remainder to his nephew, proviso that it shall be voyd upon tender of a ring by him; after he was attainted of treason, and all his inheritances forfeited by statute; the queen leaseth to the defendànt for forty years; by statute it was inacted that every one who had a patent of land of a person attainted, shall exhibit it into the exchequer within two years to be inrolled; one authorized by letters patents in the name of the queen tenders the ring in the life of Sir *Fr.* the queen bringeth intrusion.

1. *Resol.* When the Q. tenant *per auter vie* leaseth for years, this is good without recital of her estate, for it is lesse than her estate, as if she grant *totum statum suum*, for there is no torte, and she is not deceived.

2. That this condition is given to the Q. but object. 1. That it was inseperable from Sir *Fr.* for his intent was the substance of it, and his intent cannot be transferred over; 2. Natural affection is made the judge whether the nephew deserve that the use shall be revoked, and in so much that natural affection cannot be transferred, no more can this condition which was created by natural affection, and natural affection determineth the estate; 3. Although the benefit of this collateral condition be given to the Q. the performance is not. As to the first and second, it was answered, that the condition is only the substance, and all the residue is but a flourish, and that is not an inseperable condition, for any one may tender a ring as well as he.

As to the third; the performance is given to the Q. as incident to the condition.

4. It was objected, that the estate of Sir *Fr.* was not subject to the condition, because he was not possessed by limitation of use, and by 27 *H.* 8. but he was seised of his ancient inheritance; *ergo*, the lease shall not be avoyded in the life of Sir *Fr.* It was answered, that Sir *Fr.* was seised by limitation of use, and that the lease shall be avoyded.

5. It was objected, that the Q. having made this lease, being seised *per auter vie*, by her own act she shall not defeat it after. It was answered, that the Q. shall avoyd

it, for her grant shall not inure to two intents; 1. To make the lease, &c. 2. To suspend the condition, and when the Q. had two rights, she shall not lose both without speciall words.

6. It was objected, that this tender ought to be found by office, because matter *in pais*, and if it be false the party hath no remedy, because the certificat is not traversable. It was answered, that certificats which inform the Q. of her title are traversable, but certificats which are in nature of trials are not: also by the tender the uses are determined, and by the attainder, and the act of 33 H. 8. the land is vested in the Q.

It was objected, that the conveyance was void, because it was not inrolled within two years, as the statute requires, and so Sir Fr. was seised in fee, and the lease unvoidable. It was answered, that it was tendred in the exchequer to be inrolled within two years, which is all the statute requireth; the forfeiture was established by a special act, 35 Eliz.

The Case of Swans, 34 Eliz. fo. 15.

A GAME of swans in a common river are seised into the queens hands upon office found, I. Y. pleads that *abbas, &c. gavisii fuerunt toto proficuo omnium cignorum in astuaria predict. nidificantium*, and makes her self title to them, & prayeth an ouster *le maine*: all wild swans in a common river who have gained their natural liberty, may be seised for the king, because they are *volatilia regalia*, but a subject may have them in his own river, and if they escape into a common river, he may take them again, upon fresh pursute. Cignets shall be divided between the owners of the swans equally, but upon the Thames the owner of the land shall have the third by the custom: whosoever hath a swan-mark must have it by grant of the king, or prescription, and he may grant it over, and he ought to have freehold of five marks *per annum*, by the statute of 22 E. 4. c. 6. A man may prescribe to have wild swans but not as here, but that the abbot, &c. have used to take of them to their own use, and therefore adjudged against J. Y. A swan may be an estray, and so cannot any other fowl.

Sir Thomas Cecils Case, 40 Eliz. in scaccar. fo. 18.

SIR T. C. entred into an obligation to the queen to perform covenants, and shewed in the exchequer chamber matter of equity to discharge him of the said debt, according to the statute of 33 H. 8. c. 39.

1. Resol. that branch of the statute which giveth liberty to the subject to plead matter in equity in barre of debt due unto the king, extendeth to debts due at the common law, as well as by the statute, because the statute gives more speedy remedy for them, and so within the purview thereof, and so the other proviso of equal charging of land subject to debts of the king is general.

2. The court of exchequer-chamber in this case may decree upon English bill, although that process be in the exchequer at the common law, because to that purpose they are as one court.

3. An obligation to perform covenants after breach of them is within the statute.

The Lord Andersons Case, 41 Eliz. in scaccar. fo. 21.

TENANT in tail is bound by recognizance to J. S. who is attainted, tenant in tail dyes, his issue aliens *bona fide*, the king shall not extend these lands by the statute 33 H. 8. c. 39.

1. Before that statute the king could not extend lands in the hands of the issue in tail, for the debt of his auncestor, because he was bound by W. 2. *de donis*.

2. By that statute lands are extendable in the hands of the issue in tail, for debt due to the king by judgement, recognizance, obligation, or other specialty, and other cases are out of the statute.

3. The alienee *bona fide* is not within the statute, because favoured as a purchasor, and he is a stranger to the debt, and comes in upon good consideration, and benefit is given against the issue in tail, which was not before.

4. Debts due to a subject and forfeited to the king, are not within the statute, for they are not due originally to the king by any of the said four wayes mentioned in the act.

Butts Case, 42 Eliz. in com. banco, fo. 23.

A. seised of black acre in fee, and of white acre for years, grants a rent charge to B. for life, with distresse in both, B. distreins, and avowes in white acre, and good.

1. Resol. white acre is charged during the term and life of B.

2. All the rent issueth out of black acre, for as an estate of freehold it cannot issue out of white acre, nor as freehold out of black acre, and a chattel out of white acre, because intire it cannot be construed to be two rents contrary to the intent of the parties, and therefore an acceptance of a lease of white acre doth not suspend it, and in an assize black acre only shall be put in view.

3. Although the rent issueth only out of black acre, yet white acre is charged with a distresse. If a rent be granted out of three acres with clause of distress in one, this is a rent seck for all, yet the grantee shall distrein in the third acre for it, so if a rent be granted to two with clause of distresse to one of them, but a rent may be seck, and charge, at several times, and therefore if a rent be granted in fee with distresse for life, it is a rent charge for life; and seck after, but if the clause of distresse be for years, it is a rent seck for all, because the freehold is seck.

The avowry was insufficient; 1. Because he said the rent issued out of white acre, where it issued out of black acre, and although the plaintiff had disclosed the truth in his plea in barre, this doth not salve the matter in substance vicious in the avowry; 2. He deriveth the rent out of white acre, *virtute cujus*, he was seised for life, which is repugnant to have a freehold out of a chattel, and so judgement given against him for insufficient pleading.

CASES OF QUARE IMPEDIT.

Halls Case, 31 Eliz. fo. 25.

A *quare impedit* against the bishop, and incumbent, without naming the patron, the writ shall abate. 1. It is not reason the patron shall lose his patronage without being named, in case where he may be named as here ; 2. The incumbent at the common law could not plead to the patronage, and therefore it is no reason that he who cannot plead be named, and he who can, omitted ; but now the incumbent may plead to the patronage by the statute of 25 E. 3. cap. 7. which inableth the possessor to counterplead the title of the king, and by equity against a common person, in the one case after induction, in the other after institution : but in case where the patronage shall not be recovered, or that the patron cannot be named as in the kings case, a *quare impedit* shall be against the incumbent sole, or against him and the ordinary, so if a bishop disturb and die, it shall be against the incumbent sole, if a patron be named and dye, if the writ shall not abate he shall be out of possession, and if it shall abate, the tort shall not be punished, but if the patron be put out of possession, he hath remedy by writ of right, and it shall abate, the plaintiff is without remedy, therefore the writ shall stand.

Sir Hugh Portmans Case, 40 Eliz. fo. 27.

IF the plaintiff in a *quare impedit*, after appearance be non-sute, or discontinue, or be made a knight pending the writ, this is peremptory, because it is his own act, otherwise if the writ abate for default of form, or by misnomer, for this may be the default of the clerk.

Baskervills Case, 27 Eliz. fo. 28.

TITLE devolveth to the king to present by lapse, the patron presents one who dyeth, the king hath lost the presentation, for he having the first presentation, he shall not have the second: otherwise the king may suffer strangers to present one after another, and take his turn when he pleaseth, and by that means the patron shall be in a manner disinherited; and the statute of *prærogativa regis, nullum tempus occurrit regi*, is to be intended when the king hath a permanent title, and not transitory, when time is the substance of his title.

Maunds Case, 43 Eliz. fo. 28.

IN case of a reentry for non-payment of rent, or when any summe, *nomine penæ*, is to be forfeit in both the cases demand ought to be made precisely on the day, a convenient time before the setting of the sun, in the one case in respect of a condition, and in the other in respect of the penalty; but in case of distresse, he that hath the rent may demand the same at what time pleaseth him, for no losse or penalty insueth thereupon, but only a remedy to come by his rent, and if demand be made any time after the day, and before the distresse, it sufficeth.

DISCONTINUANCE OF PROCESSE, &c. BY THE DEATH OF THE QUEEN, TRIN. 1 JAC. FO. 29.

UPON a general resummons, the original, and the issue are revived, and not the mean processe, nor voucher, nor garnishment, but all the processe is revived upon a special resummons, but not in aid prayer, for if a verdict be given, and the king dyeth before the day in banck, because there summons lyeth not, therefore he shall not have resummons, but in case of verdict, he for whom it is given may have his judgement upon *scire facias*. But now by the statute of 1 E. 6. an action, sute, bill, or plaint, shall not be discontinued if they are returned, otherwise if

not, because the statute saith, depending. If one deliver an appeal to the sheriff within the year, and the king dyeth, for necessity the plaintiff shall have a *certiorari*, and reattachment : so if a formedon be brought within a year against the pernor of the profits ; offices of sheriffs, not being of inheritance, or by charter, are determined by the death of the king. Sutes depending in inferiour courts are out of the statute ; if the king dye after information preferred by him, all the proceeding is lost, but the information shall stand ; 1. Because this is a record for the king, which shall not abate ; 2. Because informations upon certain statutes are to be preferred within certain time, but if the king bring an original and dye, this is lost, if one plead to an indictment, and the king dye, he shall plead *de novo*, but if he be convicted, judgement may be given in the time of another king, by the said statute, and not before.

*Case of a fine levied by the king, tenant in tail, fo. 32.
Michaelmas, 2 Jac.*

A FINE levied by the king, tenant in tail by gift of his auncestor who was a subject, barreth the tail ; 1. It is reason, that as the king is bound by the statute of *W. 2. de donis*, that he should have benefit of the acts of 4 *H. 7.* & 32 *H. 8.* ; 2. A general statute bindeth the king of lands discended from an auncestor a subject, but not where it descends from an auncestor who was king, except in special cases ; 3. The issues of the king at the time of the levying of the fine are subjects, therefore, within the statute, and it seem'd to them that there ought to be letters patents to give power to the conisee to enter into the land.

Nevils Case, 2 Jac. fo. 33.

THE dignity of an earl intailed is forfeitable for treason ; 1. Resolved, this is within the statute of *W. 2. de donis*, and experience is to give dignities in tail, with remainder over, also, this was an office antiently, and offices may be intailed ; 2. A dignity may be forfeited at the common law, by a condition in law, for the office of

earl was *ad consulendum regem tempore pacis, & defendendum regem tempore belli*; therefore he forfeits it when he takes counsel and arms against him; 3. If it were not forfeited by the common law, yet it is by 26 *H. 8. cap. 13.* by this word hereditament, and the words use or possession, which are added, are to shew that every hereditament shall be forfeited: at the common law, donee in tail had *potestatem alienandi post prolem suscitata*, but if he retain the land himself, he hath no absolute fee, for none shall inherit but the heir, *per formam doni*, so it is now in case of annuity, and other things out of the statute.

Penall Statutes, 2 Jac. fo. 35.

WHEN a statute is made by parliament the K. cannot give the penalty, benefit or dispensation of the same to any subject, but the king may make a *non obstante*, to dispense with any particular person, that he shall not incur the penalty of a statute, and the king after a forfeiture or penalty of a statute by judgement and recovery, may grant the same to any of his subjects, by way of reward; and all the judges of *England* subscribed to this the 8 day of *November*, 1604.

Lillingstones Case, 5 Jac. fo. 38.

TENANT in fee grants a rent charge, proviso, that the person of the grantor shall not be charged, the grantee acknowledgeth a recognizance according to 23 *H. 8.* and after releaseth to the grantor, the conisee sueth an extent, and brings debt against the grantor terretenant; 1. Resolved, the rent is extendable, for notwithstanding the release it is *in esse* as to the conisee, and cannot be discharged by the act of the conisor; also, the extent relateth to the judgement, at which time it was extendable. See the Lord *Abergavenies* Case, in the sixth report; 2. Debt lyeth not so long as the extent indureth, for so long the rent hath continuance, although that by the release the free-hold be determined: if a rent charge be granted for life with proviso, as above said, if the rent be determined, debt lyeth against the grantor, because he had no other remedy.

Bedels Case, 5 Jac. fo. 40.

R. B. covenants, in consideration of paternal love, &c. to stand seised to the use of himself for life, the remainder to his wife for life, the remainder over; 1. Resolv. although the consideration in the deed runneth not to the wife, yet another consideration may be averred, which stands with the deed. The limitation of an use to the wife importeth a consideration in it self; so if it be to any of his blood, but if he covenant in consideration of a 100*l.* to stand seised to the use of his sonne, nothing passeth until inrollment, *quia expressum facit cessare tacitum.*

Beresfords Case, 5 Jac. fo. 41.

AN use is limited to A. B. and of the heirs males of the said A. lawfully begotten, this is fee tail, notwithstanding the words (of the body) be wanting, and that lawfully begotten are implied, for no heir shall inherit who is not lawfully begotten. Resolved, that to create an inheritance, the word heirs is necessary, but the words *de corpore* are not necessary to make an estate tail, if there be words which tantamount, and here the sence, according to the intent of the donor, is of or by the said A. lawfully begotten. A gift to a man & *heredibus de se exeuntibus*, or *heredibus suis de prima uxore sua*, are estates tail.

Kenns Case, 4 Jac. fo. 42.

C. K. had issue by E. S. M. K. and they are divorced, and the marriage sentenced void, C. K. marrieth F. they have issue E. K. C. dyeth; E. K. is found by office to be heir, M. and W. her baron preferr a bill, in the court of wards to traverse the office, to which the committees of the wardship answer, one of the committees dyeth, M. and W. sue a bill of reviver, and M. having issue E. dyeth, her issue, and R. her baron, bring a new bill of reviver.

1. Resolved, so long as the sentence stands in force, the issue of the first feme is a bastard, because the spiritual judge hath jurisdiction thereof, and our law giveth faith unto it : sentence of divorce may be repealed after the death of the parties, but no divorce can be after their death, for that will bastardise the issue, and the court of the king hath triall of it originally, not being hindred by any sentence.

2. The plaintiff shall not have a traverse without an office found for her, for the king being sure of wardship shall not be ousted by one before that he be sure to have benefit by him, and 2 *E. 6. cap. 8.* doth not extend to give a traverse without office, but if by two offices two are found heirs, whereof one is within age, by that statute the other may traverse immediately.

3. A bill of reviver upon a bill of reviver shall not be suffered for the infinitenesse, no more than a writ by journeys accompts. By all the last bill was absurd, which prayeth that the first bill be revived because M. was dead, but it ought to be that her heir may traverse.

THE EIGHTH BOOK.

The Princes Case, 39 Jac. in chancery, fo. 1.

THE queen 37 *Eliz.* grants three mannors, parcel of the dutchie of C. to H. L. and G. M. the king (at the suplication of the prince) brings a *scire facias* against the said H. L. and S. H. to make livery to the prince, by force of the statute of 11 *E. 3.* H. L. pleads *nul tiel recorde*, S. H. pleads the patents with a *non obstante*, 32 *H. 8.* whereby these mannors were made parcel of, &c. and the act of confirmation, 43 *Eliz.* As to the plea of H. L. the attourney showeth an *inspeximus*, and demurreth upon the plea of the other two who joyn, and as *amici curiæ* repeat part of the statute of 1 *H. 7.* touching the dutchie, H. L. demurreth.

1. Resolv. the charter of creation of the prince, Duke of C. 11 *E. 3.* is an act of parliament, for such a limitation to the first begotten son is voyd without statute, for if grandfather king, the father duke, and son be, if the king dyes, the father is king, and the son duke, by the said statute, against the rules of law.

2. The lands cannot be so annexed to the dutchie that they cannot be severed without statute.

3. The estate is limited to cease when the king hath no first begotten son, and to revive when he hath, which cannot be without statute. 4. It should be absurd, that six being then created earls, that their creation should be firm, and the creation of the prince voyd.

5. In the charter there is *de communi concilio prælatorum, &c.* and in the end, *per ipsum regem & totum concilium in parlamento*; such an act as beginneth *rex statuit*, and alwayes reputed for a statute, shall not be drawn in question, but if it be *rex ex assensu*, the commons or lords omitting the other part, it is voyd; 2. The said charter having the force of a statute, is good, without ayd of any other statute, and although the king, in his *scire facias*, recite another act for this surplus, the writ shall not abate; 3. The prince had the dukedome in fee, for it is an inhe-

ritance, because, 21 E. 3. 41. the princessé was indowed, and it is no estate tail because it is not limited of what body it shall come, but only that they shall be heirs to the black prince; 4. Against a general statute *nul tiel recorde* shall not be pleaded, for although it be lost, yet the judges ought to take notice of it, and this is such an one which concerns the prince, and the statute of confirmations doth not extend unto it; 1. Because this hath a special relation to certain defects, as 'misnosmer, &c. 2. Patents are made good only against the king, saving the right of others, therefore the prince's right is saved. In a *scire facias* the king or prince may reply, but the most formal way is, for the attorney to reply, as here he did; no son of the king but his first begotten shall be Duke of C. although he be heir apparent to the crown.

Galyes Case, 26 Eliz. banco regis, fo. 32.

1. RESOLVED, that to maintain an action against an inkeeper for goods lost, &c. it ought to be a common inn; 2. He ought to be a passenger, therefore a neighbour shall not; 3. An inholder shall not answer for any thing but that which is *infra hospitium*, therefore if a passenger require that his horse be put to grasse, the inholder shall not answer if he be stollen, otherwise if he require it not; 4. There ought to be a default in the inholder or his servants, therefore if a guest bring one with him who stealeth the goods, the inholder shall not be charged; otherwise if the hostler appoint one with him in his chamber who doth it. But an inholder shall not be charged, if he require the guest to put his goods in a chamber, and he leaves them in the court, but it is no excuse to the inholder that he delivered the key of the chamber to the guest, or that no goods were delivered to him; 5. The hostler shall answer for charters if they be stollen, but not if a guest be beaten, and all this appears by the writ, and the words of it.

Paynes Case, 29 Eliz. com. banco, fo. 34.

A FEME tenant in tail, taketh baron, and hath issue, who is heard to cry, and dyeth, the feme dyeth without issue, the husband shall be tenant by the courtesie, for although the state of the feme be determined, yet it is *tacite* implied in the gift, that every husband of a feme inheritable to the said estate, shall have the land for his life, after the death of the feme; if he be intituled to be tenant by the courtesie. If a feme be delivered of a monaster, this doth not intitle the husband to be tenant by the curtesie, otherwise it is, if the issue had humane shape, but is blemished: if a feme be ripped, and the issue taken out of her wombe, the baron shall not be tenant by the curtesie, otherwise it is if the issue which they had dyes, and lands descend after. A man shall not be tenant by the curtesie, but where his issue may inherit as heir to the feme, therefore he shall not be of a possession in law, because there he makes title from the ancestor of the feme, and not from the feme.

Barretry, 30 Eliz. fo. 36.

A COMMON barretor is a common maintainer of sutes or quarrels, in courts, or in the country: as, first, in disturbance of the peace; secondly, in taking and keeping of possession, with force or deceit; thirdly, by false calumniation and sowing of quarrells, but to indite him of it, it ought not to be, that he hath done so twice or thrice, but that he is a common doer of them.

Grieslies Case, 30 Eliz. com. banco, fo. 38.

BY the custome, one is chosen in a leete to be constable, who refuseth, and departeth out of the court, the steward imposeth a fine of 5*l.* upon him, for which the bailiffs of the lord distrein, and he brings a replevin.

1. Resolved, every judge of record may asseesse a reasonable fine upon any man who makes contempt or disturbance to the court, but a judge who is not of record cannot.

2. This fine needs not to be afferred, because the statute of *Mag. Ch.* speaks of amerciaments, and not of fines, for a fine is imposed by the court, and an amerciament by the jury: therefore the judgement in an amerciament is general, *quod sit in misericordia*, and after upon estreits directed to the coroners they are afferred, and the statute is, that a noble man shall be amerced by his peers, which is not used at this day, because it is reduced to a certainty, (*viz.*) a duke to 10*l.* and another to 5*l.* but an amerciament of an officer of the court, or he who hath execution of writs, shall be afferred by the court, so of any who is judge as suters: if a juror appear, and is adjourned to a day, of which he makes default, this shall be inquired by his companions, for he shall be fined to the value of his land *per annum*, which the court cannot know.

3. A distresse may be taken for a fine without custome, or for an amerciament which is lesse.

Whittinghams Case, 45 Eliz. fo. 42.

IT was resolved, that if there be lord and tenant an infant, and the infant make a feoffment in fee, and execute the same by livery of seisin by his own hands, and after dye without heirs, in this case the lord shall not have the benefit of the escheat, and the feoffment is unavoydable.

There be three manner of privities, (*viz.*) Privity in blood; 2. Privity in estate; 3. Privity in law. Privities in blood, as heirs in blood; privity in estate, as jointenants, baron and feme, donor and donee, lessor and lessee, &c.; privities in law, as lord by escheat, lord of a villain, &c.

If a lessee for life make a lease for years, and after enter into the land, and make waste, and the lessor recover in an action of waste against the lessee for life, he shall avoid the lease for years, made before the waste committed. But if a lessee for life make a lease for years, and after enter and make a feoffment in fee, the lessor shall not avoid the lease for years, and so if a tenant make a lease for years, and after is attainted of felony, or dieth without heir, the lord by escheat shall not avoid the term. But because the feoffment in the case at barr was executed by letter of attourney, it was resolved to be void, and the land escheated to the queen.

Jehu Webbs Case, 6 Jac. com. banco, fo. 45.

THE king grants the office of the kings tennis plaies at W. to one, who being disseised brings an assize.

The patent shall have a reasonable construction, not only when the king himself plaies, but when any of his houshold. As if a commission be made to take singing-boys in a cathedral church for the kings chapel, those that sing there for their pleasure cannot be taken, but such as get their living by it. There were but two manner of assizes at the common law, assizes *de libero tenemento*, and *de communia pasturæ*, but for no other common, but for this only there is a writ in the register. But the statute of W. 2. c. 25. giveth it, *de proficuo in certo loco capiendo*, in lieu of a *quod permittat*, and although that there offices amongst other things are named, yet an assize lay of an office at the common law, and although that no tenant for life may have a *quod permittat*, yet an assize did lye for him, but that is to be understood of an office of profit, for it lyeth not of an office of charge: original writs made by statute cannot be altered without statute: in an assize of a new office, it ought to be shewed what profit belongs to it, but not for an ancient office, because that is sufficiently known.

Syms Case, 6 Jac. fo. 51.

TENANT in tail levyeth a fine with warranty, and dyeth; the warranty descends upon the issue of him in the remainder, inheritable to the tail, and another; the issue in tail brings a formedon, and is barred for all, for the warranty is intire, and barreth every one upon whom it descends, of all his right; as if one seised of three acres maketh a feoffment of one with warranty, and dyes, having issue two daughters who make partition, the mother purchaseth the part of one, & brings dower against the feoffee who vouches the daughters, she shall recover all the other acre of the other daughter, if tenant by the curtesie make a feoffment with warranty, and dyes, and his son heir of the feme recovers, and assets descends after,

the feoffee shall have a *scire facias* to have the land first recovered, by the statute of *Glouc. c. 3.* But if assets descend to the heir in tail, bound with a lineal warrenty, after recovery in formedon, the feoffee shall have a *scire facias* to have the assets; for otherwise if the recoverer alien the assets, the issue of him will recover the land in tail again; but in the cases the discontinuee ought to confesse the title of the demandant, and pray that if assets descend after, they may descend unto him, for if he plead a warranty and assets, this is peremptory unto him, if it be found that assets did not descend: for the statute is, that a *scire facias* shall issue out of the rolls of the justices, and in this case there is no ground for the *scire facias* in the record, but in this case if the issue in tail pleads no assets, and assets are found, but not to the value, the tenant shall have a *scire facias* to recover the assets descended after, for that false plea of the vouchee. Warranty and estoppel descend upon the heir general, and warranty barreth although that he upon whom it descends claimeth not by him that made it, but so doth not an estoppel, but estoppels with recompence bind the right of one who claimeth not by him that made it.

Roger, Earl of Rutlands Case, 6 Jac. fo. 55.

THE king grants the pannage and herbage of a park to M. for life, and, reciting this, grants it to the Earl of Rutland for his life.

1. Resolved, the king hath three manner of inheritances; 1. Some which he cannot exercise himself, and cannot grant them in reversion or remainder, as corodies and churches of which he is patron; 2. Others which he cannot exercise himself, but may grant them in reversion or remainder, as offices; 3. Others which he may exercise himself, and may grant, as lands, houses, &c.

2. The king here is not deceived, for when he reciteth here that M. had for life, and grants for life, this inureth, as by law it may, that is, as a grant in reversion.

3. In this case the grant to the earl shall commence after the determination of the estate of M. and if the king grants land to one and his heirs, *habendum* to him and his assigns, it is good, and the *habendum* shall be rejected

for the honour of the king. See the Lord *Chandos* Case in the sixth book, and when a charter of the king may be taken to two intents good, in many cases it shall be taken to such intent as is most beneficial for the king; but if it may be taken to one intent good, and to another void, then for the honour of the king, and benefit of the subject, it shall be taken so that it may take effect.

Beechers Case, 6 Jac. fo. 58.

B. plaintiff in debt, *se retraxit* by attorney, and by the judgement is not amerced, he brings error. 1. Resolved, a *retraxit* ought to be in proper person, for at the common law every one who appeared ought to come in proper person and make his attorney after, by license of the court, but if it be without writ, he cannot without a writ of *attornato faciendo*: in cases where one may make an attorney, but for contempt is bound to appear in person, if he appear by attorney, this is not error, because the court may dispense with the contempt, otherwise where he cannot appear by law by attourney, as here, for if it appear by attorney, this is error; 2. B. ought to be amerced if upon a nonsute, *à fortiori* upon a *retraxit*, and although it is for his advantage, yet he may assigne it for error, because the judgement is not perfect, and because it is for the advantage of the king, and it shall not be amended because the act of the court; 3. Where one disclaims he shall not have a writ of error, because he hath confessed that he had no right, otherwise it is upon a *retraxit*, for this is but a barr of the action, *à fortiori* here, where it was void, done by an attorney, a *retraxit* ought to be when the party is supposed to be present, therefore it shall not be when he imparleth.

Swaynes Case, 6 Jac. fo. 63.

1. Resolved, the king grants a manor for life except timber trees, the lessees grant copyhold, the grantees may shrowd timber trees because they come in by custome, *paramount* the exception; 2. If copyholders prescribe to take profit in any part of the manor, if the lord aliens it, a copy-holder admitted after shall have it, because he is in *paramount* the severance, but he shall prescribe and plead specially, that is, until such a time, (*viz.*) before the severance *talis habebatur, &c. consuetudo, &c.* and then shew a severance,

Sir William Fosters Case, 6 Jac. fo. 64.

C. F. made a feoffment, 4 E. 6. reserving a rent charge, which rent descends to T. F. who dyes intestate, his administrators avow for it, and alledge no seisin within 40 years, yet good, for the statute of 32 H. 8. c. 3. that none shall avow for rent if he had not seisin within 40 years, is to be intended when it was necessary to alledg, as upon rent betwixt my lord and tenant, for this may be had by incroachment, and perhaps the commencement of the seigniorie was before time of memory, but where rent is by deed or reservation, as here, or upon an estate tail, the seisin is not material, for the deed or reservation is the title, and incroachment shall not hurt, and they shall not have a *ne injuste vexes*, but shall avoyd it in an avowry, and *magna charta, c. 10. Quod nullus distringatur ad faciendum majus servitium, &c.* doth not extend to donee in tail, lessee for life, &c. but is intended between very lord and very tenant.

Lovedays Case, 6 Jac. fo. 65.

IF a jury who appeareth to try a certain issue, give a verdict which is accepted, be it perfect or imperfect, they are discharged, and shall not try the same issue upon a new *nisi prius*, but a *venire facias de novo* shall issue; otherwise it is of the recognitors of an assize, they shall try all the issue, because they are not to try any certain issue; and because they come in upon an original the court will not award a new original, but the plaintiff shall have a *certificate* of assize to try the imperfections, the plaintiff sueth a *venire facias* against diverse, the sheriff returneth no writ, the plaintiff shall not have severall *venire facias* after, for he cannot vary from the first.

Croghates Case, 6 Jac. fo. 66.

THE defendant pleads in barr to trespassse that the B. of N. leased by copy to W. M. to which copyhold there is common in B. and justifieth as servant to the said W. the plaintiff replies *de injuria sua propria*, &c. this is an insufficient replication, for *de injuria*, &c. hath reference to all the plea in barr, and not to the commandement; *ergo*, if the defendant in false imprisonment justifie, for that a *capias* was awarded to the sheriff, who made a warrant to him to take the plaintiff; *de injuria*, &c. is no plea, because it referreth to all, and so record shall be tried by jury, but he shall traverse the warrant, which is matter in fact, but this had been a good plea, if the proceeding be in a court which is not of record; 2. *De injuria*, &c. is to be pleaded where the plea is matter of excuse, and not where he claims an interest in his own right, or in the right of his master, for there he shall traverse the commandement; 3. Where authority is derived from the plaintiff himself, or is given by law, as to fee if waste, the plaintiff ought to answer to it, although no interest be claimed, and he shall not plead *de injuria*, &c.; 4. If this plea be admitted here, all parts of the plea in barr shall be tried, and the issue will be full of multiplicity.

Trollope Case, 6 Jac. fo. 68.

THE defendant in error pleads excommunication, &c. and sheweth the certificat of the vicar general *de D.* the words which were *universis clericis & literatis per totum diocesim D.* the plaintiff pleads the general pardon, 3 Jac.

1. Resolved, the official cannot certifie excommunication, for none shall doe that but he to whom the court may write to assoil the party, as the bishop and chancellour of C. or O. and for that, if a bishop certifie and dye before the return of the writ, it shall not be received, but the successor shall doe it, and one bishop shall not certifie an excommunication made by a bishop in another court, but a bishop after election before consecration may, and so may the vicar general, if it appear that the bishop is in *remot's agendis*; 2. The certificat is insufficient, because by the particular direction to the clerks of D. the kings court and all others are excluded, and so a protection in one court serveth not in another, and excommunication is such a thing as the court of the king hath conusance, and therefore the sute and the cause are to be expressed in the certificat, that the kings court may judge of the sufficiency, and if it be insufficient (as if a bishop certifie an excommunication made by himselfe in his own cause) the court may write to absolve him. If the certificat had been good the point was, whether the general pardon dischargeth an excommunication or not.

Whitlocks Case, 6 Jac. fo. 69.

A REVERSIONER upon an estate for life levyes a fine to the use of himself, until marriage of his son, and then to the use of himself for life, with power to make leases, so that they exceed not 21 years, or three lives, reserving the ancient rent, the remainder to his son in fee, the son is married, the father maketh a lease for 99 years, if two shall so long live, reserving rent to him, his heirs, and the reversioners, this is a good lease.

1. Resolved, he had pursued his authority, for if he had a particular power to make leases for 21 years, or

three lives, he cannot make leases determinable upon lives, but having a general power to make leases, so that they doe not exceed 21 years, or three lives, he may.

2. The rent reserved goeth to the son, although that he who reserved it had but for life, because the lease for years hath no being out of the lease for life, but out of the fee, and in judgement of law proceedeth both in construction upon the limitation of uses, but the most safe way here had been to reserve the rent generally, and left it to the distribution of the law.

Greenelyes Case, 7 Jac. fo. 71.

BARON and feme, tenants in special tail, the baron infeoffeth P. G. and dyeth, the feme dyes, the sonne enters, and leaseth to the plaintiff.

1. Resolved, if baron jointenant in special tail with his wife, had made a feoffment, or had been disseised, at the common ley, and dyed, and the feme before entry dyed, this is a discontinuance to the son, because he cannot enter as heir to both, but if the feme enter, the discontinuance is purged.

2. The estate which the feme had jointly with her baron is within the purview of the statute of 32 *H. 8. c. 20*. That no fine levied by the baron sole of lands of the feme shall hurt her, and within the statute of *West. 2. c. 3*.

3. The entry of the son is lawful, although he claimes not as heir to the feme, as the statute speaks, but as heir to both, because he is within these words, or to such as have right by the death of such wife, and this is to be intended of discontinuances made by the baron, and not of a rightful barr of the issue, for they cannot avoyd it, and the statute is that they may enter, which they cannot doe where they are barred; and if the feme enter within 5 years, as she may after a fine levied by the baron, this doth not take away the future barre of the issue, and if she enters not within 5 years, she also is barred: baron tenant in tail, the remainder to the feme in tail, makes a

feoffment, the feme may enter after his death, by this statute ; but if the baron suffer a recovery she shall not enter, in the case at barr the son may have a *formedon* at the common law, and where before this statute a *cui in vita*, or *sur cui in vita* did lye, entry is given by this statute, and not otherwise.

The Lord Staffords Case, 7 Jac. fo. 73.

THE queen reversioner upon an estate tail grants the reversion to T. T. in tail upon condition is to have *predictam reversionem* in fee, the condition is performed, the Lord Stafford tenant in tail levyeth a fine, his issue is barred. 1. Resolved, that a condition of accruer may be annexed to a thing which lyeth in grant, and to an estate tail, as if lessee for life be the remainder for life, with condition of accruer to the first, this is good, and yet no merger of estate ; four things are requisite to an accruer ; 1. A particular estate as the foundation, *ergo*, a lease at will shall not be ; 2. The estate ought to continue in the grantee until accruer, therefore if the grantee alien and purchase, the condition is tolled, but *quare* if the tenant alien upon condition which is broken, if the fee shall acrew, but grantee may grant part of his estate, as if lessee for life make a lease for years, he may perform the condition after, so may tenant in special tail, after he is become tenant in tail after possibility, &c. so may the surviving jointenant and the heir of tenant in tail. An instant is sufficient to support an accruer, as if the condition be, if the lessee be ousted *eo instante*, that the ouster is the fee accrueth, but if lessee for years accept a confirmation for life, the condition is gone : but it is not necessary that the estate of the grantor or lessor continue, because by his own act he shall not defeat his grant ; 2. It ought to vest at the time of the condition performed, or never, and for that, rather that it shall not vest at this time by performance of the condition, the fee without office or other ceremonies be devested out of the king ; 4. It is necessary that the particular estate and the condition because the deed, or two deeds delivered at the same time, for in law they are but one grant, and by the condition performed, he had fee from the delivery.

Resolved, *prædict. reversionem* signifies the reversion which the queen had, *viz.* that which depends upon both the estates tail, and so was the intent; also she granted, *omnia præmissa*, which maketh it cleer. Resolved also, that these words will and declare, doe amount to a grant, and are so used in patents of liberties, and things to take effect *in futuro*. Tenant in tail, the remainder in tail, the remainder to the king; tenant in tail suffers a recovery; this doth not barr the remainder in tail, because the issue in tail is not barred, and therefore the reversions and remainders in tail are preserved by the statute of 34 H. 8. c. 20.

Lastly, resolved, if the reversion in fee had remained in the crown, that the fine levyed by *Ed. Lord Stafford* the father, had not barred the lord that now is. *Nothyes Case*, 31 Eliz. com. banco.

Wiat Wields Case, 7 Jac. fo. 78.

W. W. seised of land, to which he had common appurtenant, aliens 5 acres to one who in replevin counts that he and those, whose estate he had in the said 5 acres, have had common there, &c. and good. 1. Resolved, although by purchase of part of the land in which, &c. the common appurtenant is destroyed in all, yet it is not so by alienation of part of the land to which but all remains without damage to the tenant of the land; 2. That the pleading of it was sufficient.

Vinyors Case, 7 Jac. fo. 80.

ONE was bound to stand to the award of W. R. and revokes the submission, the obligee brings debt. 1. Resolved, the countermand is good, for an authority countermandable by the law cannot by any way bee made irrevocable; 2. Although that the plaintiff doth not show that the defendant had given notice to the arbitrator, yet it is good, because this is implied, for without notice the revocation is voyd; 3. The obligation by the countermand is forfeited, because he doth not stand to, &c. when he countermands it. 4. By his own act he had made the

condition impossible; *ergo*, the obligation is single, if one bindes himself to give license to carry wood, &c. for a certain time, if he give it, and disturb him, the obligation is forfeited.

Sir Richard Pexhalls Case, 7 Jac. fo. 83.

SIR R. P. seised of lands, part whereof is holden *in capite*, deviseth 100 sheep, 10 bullocks, and 10*l.* quarterly, to one with clause of distress, and that the grantee shall hold his courts for his life, for rent arrear for two years, the grantee avoweth. 1. Resolved, a devise of rent out of all is good, and taketh effect out of two parts, and as to the third is void; 2. The grantee shall have an estate for life in the rent, and so he shall if it be granted by deed, also by the intent of the devisor it appears that the grantee shall hold courts, and have 10*l. per annum*, for his wages and quarterly here had relation to rent only, because the word *et*, disjoyneth it from sheep and bullocks, and judgement given for the avowant.

Buckmers Case, 7 Jac. fo. 86.

T. B. gave a house in gavelkind to M. his eldest daughter in tail, the remainder of one moiety to J. a second daughter in tail, the remainder of the other moiety to K. a third daughter in tail, with crosse remainders to J. and K. M. discontinueth and dyeth without issue, J. dyeth without issue, K. dyeth, and her issue brings a formedon in the remainder, and good, although several remainders, for they depend upon one estate, and commence by gift at one time. In actions real, in which title is expressed, a man shall not have one writ for lands to which he had several titles, as in escheat, cessavit, writ of mesne, &c. but he may have a writ of ward of land only, although it be by several tenures, nor one formedon upon two distinct gifts, where the foundation is several, but he shall have it if there be one gift, although it take effect at several times, because the foundation was joint and single, as upon a gift in tail, to brother and sister, who dye without issue, or if the brother dye without issue, and the sister dye having issue, who dyes without issue, he to whom the remainder limited

shall have one formedon, although it vests at several times, so in an estate tail to father and son, and so here. In actions real, founded upon torte, a man shall have one writ to recover lands, to which he had several titles, as in an assize, a writ of entry, &c. but in a writ of entry upon disseisin made to my mother, and her sister coperceners, because their title is in the writ, it appeareth he ought to have several actions; but in personal actions, one may comprehend several torts, and causes of actions, as trespassse for trespassse made at several dayes and places, waste upon several leases, and so of debt. *Nota*, if a remainder be executed, issue in remainder shall not have a formedon in remainder, but in the descender, and count of an immediate gift, but if there be a lease for life to one, the remainder in tail to A. the remainder in tail to B. A. dyes without issue, if B. be chased to his formedon, he shall not count of an immediate remainder, but shall shew the first remainder to A. and that he is dead without issue; 2. In formedon in the remainder or reverter, omission of issue inheritable in the pedigree of the demandant abates the writ, but not upon the part of the particular tenant; 3. The demandant must make mention of the son who survived the father, to which son the land descended, but was not seised by force of the tail, but he shall name him son, but not heir; 4. The demandant in a formedon in the descender must make himself heir to him that was last seised, and he to the donee. Note here, because K. was never seised, the writ shall say *remanere*, not *descendere*, and the writ was, *remansit jus*, because a discontinuance, otherwise it should be *tenementa remanserunt*.

Fraunces Case, 7 Jac. fo. 89.

THE plaintiff pleads in barr of avowry, that R. F. devised to I. his son, who leased to him; the avowant replieth that after the devise, R. F. made a feoffment to the use of the said I. upon condition that he shall suffer his executors to take away his goods, and the estate limited to him was for sixty years, if he should so long live, with diverse remainder over, and that after the death of F. I. hindered the executors to carry away the goods, whereupon T. in remainder entred, and judgement given for the plaintiff.

1. *Resolv.* although the condition be taken strictly, the uses to I. only, and to his heirs, are only avoided by it; 2. A disturbance by parol is no breach of the condition, and because the avowant did not shew a special disturbance, his replication was voyd; 3. I. ought to have notice of the condition being a stranger to it, or otherwise he cannot break it, as a copy-holder shall not forfeit for denial of rent to him to whose use a mannor is transferred before notice, but he who bindes himself to doe any thing must take notice at his peril, because he hath taken it upon him; 4. Although that the title which the plaintiff had made in barre to the avowry be destroyed, yet he shall have judgement, because his count is good, and another title (that is, to have the land for sixty years, by force of the uses declared upon the feoffment) is given unto him by the replication, although that the title which he made for himself be destroyed, yet the court must adjudge upon all the record, and judgement was entred for him accordingly.

Edward Foxes Case, 7 Jac. fo. 93.

A REVERSIONER upon a lease for life, the remainder for life in consideration of 50*l.* demiseth, granteth, &c. his reversion for 99 years, rendring rent, this is a bargain and sale, and there needs no attornment, for the words of bargain and sale are not necessary, if there are words which tantamount, as if at the common law one had sold his land, an use had been raised to the vendee, because their intent so appeared; so here: but if it appear that their intent was to passe it at the common law, as if a letter of attorney be made to make livery, the use had not risen, and here appeareth their intent to passe it as a bargain and sale, because rent is reserved presently, therefore it is reason that he shall have the rents of the particular tenants presently, which cannot be if it passe not by bargain and sale, and inrollment is not necessary, because a term for yeares only passeth in this case, and no freehold. See *Sir Rowland Heywards Case*, 2 report fo. 35.

Mathew Mannings Case, 7 Jac. fo. 94.

LESSEE for years is bound in 200 markes to W. C. and deviseth to his wife for life, and after her death to M. M. and makes his wife executrix, who agrees and dyeth intestate. M. M. enters, and takes administration of the goods not administred. W. C. brings debt against him. Resolved, that M. M. takes by executory devise, and not as a remainder, and the estate limited to him in construction precedeth the limitation to the wife, as if he had devised that if the wife dye within the term, that then M. M. shall have the residue, and also devised it to his wife for life; 2. This case is most strong, because a chattel which may vest and revest at pleasure of the devisor, without mischief to the *præcipe*; 3. A devise of the term, and occupation thereof, all one, (*viz.*) so many years as the feme shall live, the remainder to M. M.; 4. After the executrix had agreed, the first devisee cannot barr the executory devise; 5. A man may devise an estate, which he cannot convey by act executed as to his executors, until his debts shall be paid, the remainder over, they have a chattel determinable upon payment of the debts, which cannot be at the common law. If a sheriff sell a term upon a *feri facias*, and judgment is reversed, the sale shall stand, otherwise none will buy any thing upon execution, and judgement was given for the plaintiff, and affirmed in error.

Baspoles Case, 7 Jac. fo. 97.

F. and B. put themselves in arbitrament for all demands, sutes, so as the aforesaid award be delivered in writing, &c. at the feast of Saint James, the arbitrator awards that B. shall pay 22*l.* to F. B. refuseth to pay. F. brings debt upon the bond to stand to the award, and good; 1. Resolved, that the award was of both parts, for the one was to pay money, and the other to discharge the debt; 2. Resolved, that whereas the plaintiff saith, that the award was made, *de præmissis*, which until the contrary be shewed, shall be intended of all: when the submission is general, an award of part is good, for otherwise the parties may conceal one thing and make the award void; but if it be

of diverse things in special, *ita quod arbitrium fiat de premissis*, an award of part is void, but good without such conclusion; so if two of one part, and one of the other part, submit themselves, arbitrament between one of the one part, and another of the other part, is good.

Sir Richard Letchfords Case, 7 Jac. fo. 99.

TENANT by copy in fee (where there is a custome that the heir after the death of his auncestor, within three courts and proclamations made, shall be barred if he claimed not) dyes, his heir beyond the seas until three courts and proclamations passe, and returns, and claimeth to be admitted, he is not barred no more than by non-claim upon a fine; *ergo*, this custome shall be construed, if he be within the realm, of full age, &c. but if he go over the seas after the death of his auncestor, he shall be barred, as in case of a fine; 2. Resolved, although he was not in the kings service, this is not to the purpose, because by intendment he cannot have notice; but a *mulier puisne* over the seas shall be barred by the dying, seisen of the bastard *eigne*, for the right of the *mulier* is barred, and the bastard is made *mulier*, although that a descent of the disseisor of a rent or thing which lyeth in grant barreth not the disseisee, yet if a bastard *eigne*, dye seised of it, this barra the *mulier*. If two daughters, whereof one is a bastard *eigne*, enters and dyes, before or after partition, the *mulier* is barred; otherwise, if two daughters, and one of them had no colour of partition, if bastard *eigne*, dye in the life of his father, having issue, who enters after the death of the father, and dyeth seised, having issue. *Quare*, if the *mulier* be barred, *mulier* is barred by descent, before entry of the son of the bastard *eigne*, as if issue be in *ventre sa mere*, or the wife of the bastard indowed.

John Talbotts Case, 7 Jac. in second deliverance, fo. 102.

LORD and tenant by homage, fealty, and herriot service of 50 acres, the tenant infeoffeth the lord of three acres, and after infeoffeth the plaintiffs father of three other acres, parcel, &c. who dyeth, the lord distreineth for herriot, the plaintiff brings replevin, and good; 1. All intire services to render an intire chattel of profit, or pleasure, by alienation of part shall be multiplied, and by purchase of part by the lord, extinct; 2. Personal services for the publique good, which are intire, as chivalry, homage, and fealty, shall be multiplyed, and not extinct; 3. Other personal services, as butler, sewer, &c. shall not be multiplied, but shall be extinct. So of a personal office, and manual labour; 2. There is no diversity between an intire chattel, be it annual or not, as if it be to render a horse every five years by purchase of part, it shall be extinct; 3. If the father of the plaintiff had been first infeoffed, and then the lord, the herriot had remained, because there the father of the plaintiff held by a several herriot before the lord was infeoffed; 4. But herriot custome, by purchase of part, is not extinct.

Doctor Bonhams Case, 7 Jac. fo. 114.

THE President and Censors of the College of Physicians in L. by colour of letters patents of H. 8. and the statutes of 14 H. 8. and 1 Mar. fined and imprisoned Doctor Bonham, for practising of physick in L. without their allowance, (the fine to be paid to them,) and also for contempt made to the college, whereupon he brings false imprisonment, and adjudged for the plaintiff.

1. Whether a doctor of one university or other be within the act.

2. Admitting that he is, whether he be within the exception in 14 H. 8. Justice Daniel held, that such a doctor was not within the body of the act, and if he were, yet he is within the exception, but Warburton, *à contra*, for both points: Cooke spake not to them, but they all agreed that the action was maintainable for two other points.

1. Whether the censors have power to fine and imprison.

2. Admitting that if they have pursued it, the censors have no power in this case to imprison the defendant, for they have no power to punish by fine and imprisonment, those who practise without their license, but those practisers who misadminister physick.

1. Because the clause that none shall practise without their license, and the clause which giveth to them the said power, are distinct clauses.

2. The first clause imposeth another penalty, and *5l.* every moneth that he practiseth, but leaveth the evil administration of physick to be punished by the college, because this is uncertain.

3. To make one punishable by the first branch, he ought to practise by a moneth, otherwise it is by the second.

4. By this way they shall be both judges and parties in one cause.

5. If doctor B. shall be punished by *5l.* by the moneth, and also at their pleasure, he will be often punished for one offence ; 2. Admitting that they had power, yet they have not pursued it ; 1. Because the president, who hath no power, joined with them ; 2. The fine was imposed for not appearing before the president and censors, and the president had no power ; 3. Half of the fine belongs to the king ; and here all is to be paid to them ; 4. The imprisonment ought to be presently, as upon the statute of *W. 2. cap. 12.* ; 5. Their authority being by patent and statute, their proceedings ought not to be by parol, and the rather, because they claim authority to fine and imprison.

6. It shall be taken strict, because against the liberty of the subject, therefore, before 1 *Mar.* the gaoler was not bound to receive them, and this doth not enlarge their power, but that the gaoler shall forfeit double the amercia-ment if he refuse. Admitting the replication voyd, although that the college demurr upon it, yet the plaintiff shall have judgement, because in the barr the defendants have shewed that they have imprisoned him without cause, for upon all the pleading it appeareth that he had cause of action ; but if a barr be insufficient, and by the replication it appears that the plaintiff had no cause of action, he shall not have judgement. A count may be made good by barr, and a barr by replication in matters of circumstance, but not of substance. See there seaven things observed by *Cooke*, for the better direction of the president and com-
minalty of the said colledge hereafter.

The Case of the City of London, 7 Jac. fo. 121.

IT is a good custome within a city that a foreigner within the said citie shall not sell things by retail, and it is good also upon pain of 5*l.* but it is not good by charter ; therefore cities which are incorporate within time of memory cannot have such privileges without parliament : so of a custome, that goods forein bought and forein sold, shall be forfeited : so one may prescribe to have a bake-house in a town, and that no other shall have one there, and the statutes which provide that every one may sell in retail, or in grosse, extend only to merchants, aliens and denizens, who export and import things vendible. Three inconveniences by confluence of people to *London*, &c.

The Case of Thetford Schoole, 7 Jac. fo. 130.

LANDS of the yearly value of 35*l.* in an. 9 *El.* was devised by the will of *Thomas Fulmerstone*, to certain persons and their heirs for maintenance of a preacher, four dayes in the year, of the master and usher of a free grammar school, and four poor people, viz. two men and two women, and a special distribution was made by the testator, amongst them of the said revenues, (viz.) to the preacher one certain sum, to the school-master and usher other certain summes, and to the poor, &c. amounting *in toto* to 35*l. per annum*, which was the annual profits of the land at that time, and after, the lands became of a greater value, (viz.) 100*l. per annum*. Question, whether the preacher, school-master, usher, and poor, should have only the summes appointed to them by the founder, or that the renew and profits of the land shall be imploied to the increase of the stipends of the preacher, school-master, &c. or in what manner the surplusage should be employed. And it was resolved, that the renew and profit of the said land should be imploied to the increase of the stipend of the preacher, school-master, usher, and poor, and if any surplusage remain, the same to be expended to the maintenance of a greater number of poor, &c. and nothing thereof to be converted to the devisees, or their one use,

and this resolution is grounded upon apparent reason, for if the lands should decrease in value, the preacher, school-master, &c. should lose, so when the lands doe increase in value, (*pari ratione*,) they should gain. *Vide statutum templariorum ita semper quod pia & celeberrima voluntas donatorum in omnibus teneatur & perpetuo sanctissime perseveret.*

Turners Case, 8 Jac. com. banco, fo. 132.

IN debt against an administrator he pleads recoveries had against him in the court of C. which amounts to all which he had in his hands, the plaintiff replyeth that one is by covin, and that the other recoveror had accepted a composition, and that the defendant delayed to accept a release to defraud the plaintiff: adjudged for the plaintiff; 1. Although that two recoveries are without covin, yet the composition so operates that nothing shall be accounted administred, but only so much as he hath paid by composition, and the converting of any part to his own use, and the deferring to accept a release, is against the office of an executor, and shall not aid him; 2. The barr is insufficient, because he hath not shewed that the court of C. had power to hold plea of debt; 2. Because he hath not shewed that the testator was bound in an obligation, and if it were only upon contract, the administrators were not chargeable in debt; 3. Be the replication evil, yet because the barr is insufficient, the plaintiff shall have judgement, because he had not shewed any thing against himself, but if it appear by the replication that he had no cause of action, he shall be barred.

Mary Shipleys Case, 8 Jac. fo. 134.

AN action of debt against an executor of 200*l.* the defendant pleaded *plene administravit*, the plaintiff replies that the executor had assets, the jury found assets to the value of 172*l.* judgement was given to recover the whole debt of 200*l.* and damages, and costs of the goods of the testator. S. &c. *et si non*, then the damages of the proper goods of the defendant.

Sir John Nedhams Case, 8 Jac. com. banco, fo. 135.

IN debt as administratrix upon administration committed by the Bishop of R. the defendant pleads administration committed unto him by the Dean and Chapter of C. *sede vacante*, because the intestate had *bona notabilia*, &c.; the plaintiff replies that that administration was repealed: *adj.* for the plaintiff.

1. *Resol.* Because it is not shewed that the intestate had *bona notabilia*, &c. it shall be intended that he had not, and yet the administration is not voyd, but voydable.

2. Before the repeal of administration committed by the metropolitan, the inferior ordinary may commit administration, because this is by the repeal declared voyd *ab initio*, and an administration is but an authority which may well commence *in futuro*.

3. The committing of administration to the obliger hath not extinguished the debt, because it is in anothers right, otherwise it is, if the obligee himself make the obligor his executor, because this is his own act, *de bonis defuncti trina dispositio*; 1. *Necessitatis, ut funeralia*; 2. *Utilitatis*, that every one shall be payed in due order; 3. *Voluntatis*, as legacies.

Sir Francis Barringtons Case, 8 Jac. com. banco, fo. 136.

THE Lord R. granted wood within a forest, in which the plaintiff had common, which grant is confirmed by statute, the grantee cuts wood, and incloses it, the commoner shall lose his common for seven years.

1. *Resol.* The grantee had an inheritance to take in another soyl, and the soyl is to the Lord R.; 2. Although the grantee had not the inheritance, yet the statute extends to him, and he may inclose, for the statute is, or any other person to whom wood is sould; 3. 22 E. 4. cap. 7. extends to wood which one had in severalty, and not where another had common there; for at the common law, one who had wood in a forest cannot incluser against a commoner, but if it be his several wood, he might inclose; *parvo fossato*, &c. for three years.

4. The said statute is as a conveyance between the king and his subjects, which taketh not away the right of third persons, as the commoner here is.

5. In the said statute there is a clause that he may inclose without suing to the king, or other owner, so that power is given against them, and not against a commoner. Beasts of forests are hart, hind, hare, wild boar, and wolf: of chase, buck, doe, fox, martin, and roe.

6. By the statute of 35 H. 8. cap. 17. he is barred of his common, which provideth that no beasts shall be suffered to come there for seaven years.

7. The statutes which concern forests are general, because they concern the king, and the court shall take notice of them.

Doctor Druries Case, 8 Jac. fo. 141.

DOCTOR DRURY recovers against B. who is outlawed, and taken by *capias utlegatum*, and escapeth, the utlary is reversed, Doctor Drury sueth execution, B. brings an *audita quærela*, adjudged that it lyeth not. It was resolved, that if A. be in execution at the sute of B. upon an erroneous judgment, and after escape, and after the judgement is reversed by a writ of error, the action against the sheriff is extinct, for he may plead *nul tiel recorde*. But until it be reversed, it remains in force, be it never so erroneous; and if the partie have judgement and execution upon the escape against the sheriff or gaoler, and after the first judgement is reversed, yet for as much as judgement upon this collateral thing is executed it shall remain in force, notwithstanding the reversal of the first, 7 H. 6. 4. Yet it seemeth to me, he may have remedy by *audita quærela*, for that the ground and cause of the collateral action is disproved by the reversal of the first judgement, a difference between mean acts, compulsory, and voluntary, and between a recovery by eigne title, and reversal of a recovery.

Davenports Case, 8 Jac. fo. 144.

TENANT for years of an advowson granteth *proximam advocacionem & donationem, si eadem ecclesia contingerit vacua fore durante termino, &c.* And afterward surrenders his terme, yet if the prochin avoydance be within the terme, the grant is good, for years cannot determine, but the effluxion of time, and the law implyes a limitation, if the church doe come voyd during the terme: for *expressio eorum quæ tacite insunt nihil operatur*: likewise if a lessee for years grant a rent charge, and after surrender, yet for the benefit of the grantee the terme hath continuance, although in *rei veritate*, it is determined, and the grantor himself shall not derogate from his own grant to make it voyd at his pleasure.

The Six Carpenters Case, 8 Jac. fo. 146.

IT was resolved when entry, authority, or license, is given to any by the law, and he abuse the same, in this case he shall be a trespassor *ab initio*: but where entry, authority, or license, is given by the party, and he abuse the same, there he shall be punished for his abuse, but he shall not be said to be a trespassor *ab initio*; and the diversity is this, because the law doth judge by the act subsequent, *quo animo*, or to what intent he enters, *acta exteriora judicant interiora secreta*: but when the party giveth authority, &c. to doe a thing, he cannot for any subsequent cause punish the same.

1. The law doth give authority of entry into a common inn, tavern, &c.

2. The lord to enter and distrein.

3. To an owner of the soyl to enter and distrein damage feasant.

4. To him in reversion to view if waste be committed.

5. To a commoner to enter into his land to view his cattel, &c.

But if he that enters into an inn, &c. doe trespasse, or take any thing away, or if the lord that distreins for rent, or owner for damage feasant, labour, or kill the dis-

tresse, or he that enters to view waste, bruse the house, or stay there all night, or if a commoner sell tymber; in these cases and such like, the law judgeth that he entered for the same purpose; and therefore the act that doth demonstrate this, is to be a trespassse, and he shall be a trespassor *ab initio*: It was resolved, that the *nonfeasance*, or not doing of a thing is not any trespassse, where the law giveth license or authority to enter, (*viz.*) to deny to pay for wine in a tavern, is not a trespassse, but the taverner may have an action of debt, 12 E. 4. 8. If a taylor over-value the making of a garment, and the necessities thereunto, he shall not have an action of debt for his own values, unlesse it be specially agreed upon before, but he may detain the garment, untill he be payd or satisfied; and if the party sue for the same, the jury shall set down the value, and the taylor shall have no more, but be barred for the rest: likewise an ostler may detain an horse, &c. Tender of sufficient amends for damage fesant before the distresse taken, is good, and the taking of a distresse afterwards is wrong; tender after the taking of a distresse, and before the impounding, maketh the detaining wrong, but not the taking; but tender after the impounding cometh to late, for then the cause is put to the tryal of the law.

Edward Althams Case, 8 Jac. fo. 150. In dower and pleaded.

N. seised in fee of lands in *W.* and *G.* deviseth the lands in *G.* to his younger son for life; it was agreed between the eldest son and the widow of *T. N.* that she should release her dower in *W.* she releaseth unto him, *omnes actiones demand, &c. nec non omnem dotem & titulum dotis, &c. de aliquibus terris in W.* both the sons dye, she brings dowre of the lands in *G.* and judgement given for to he demandant.

1. *Resol.* A release of all actions to him in the reversion barreth not dowre, because she had no cause of action against him, but against the tenant of the free hold, but a release of all her right to him in the reversion extinguisheth dowre, for a release of right barreth actions, but a release of actions barreth not a right, if there be

other means to come to it; otherwise not, as if the disseisee release all actions to the heir of the disseisor, the right is extinct, otherwise it is if the release be to the disseisor, and a discent after, or if the release be to the lessee for life of the heir; a release of all actions real and personal is no barre in a writ of errour, but a release of a writ of errour is; a release of actions is no barr to have execution; if he be not put to a *scire facias*, a release of a thing due before the time of payment thereof, is good: *querela* is more than an action, for by that the cause of action is released; by release of sutes, executions are barred, for none shall have execution without sute for it, so it is of all duties; but a release *de querelis infectis*, in that case barreth not dowre; by release of titles dowre is barred; and by release of demands, which is the most ample release of all.

2. The collateral agreement is not of any force or effect, but general words ought to be qualified by apt words contained in the same deed, as in this case, *mihi contingent per mortem dicti T. viri mei de aliquibus terris in W. &c.* and so extends not to any land in G. but restraineth the general words to the lands in W. only: *quando carta continet generalem clausulam, posteaque descendit ad verba specialia, quæ clausulæ generali sunt consentaneæ, interpretanda est carta secundum verba specialia*: as if a man grants a rent in *manerio de D. percipiendum*, in 100 acres, parcel thereof, with clause of distress in the 100 acres, the rent shall issue out of the 100 acres only.

Arthur Blackamores Case, 8 Jac. fo. 156.

THE defendant is named gent. in the original writ, but by negligence of the cursitor he is outlawed by the name of knight; this is amendable at the common law, but in case of the king, default of the court was amendable at the common law, as erroneous entrance of the continuance, essoyn, &c. and any part of the record the same terme; and therefore diverse statutes of amendments were made, one of the last whereof was 8 H. 6. cap. 12. which was more large, and extends to process, and to seven other things, to records, pleas, parols, warrants of attorney, to writs original and judicial, pannels, and returns; that is, where it was the misprision of the clerke,

and only the default of the clerk by negligence is amendable, but not by his nescience, as if an action be brought against executors in the *debet* and *detinet*, or if it be false Latine, but if a word which is not Latine be written for a Latine word, this is amendable, as *imaginavit*, for *imaginatus est*: in a writ of trespassse against diverse, if it abate for default against one, it shall abate against all, but if it be for matter in fact only, as for misnaming one defendant, it shall abate only against him; omission or addition which doth not alter the form is amendable, as if *dei gratia* be omitted: voluntary or negligent keeping of records by the clerk is amendable by other parts of the record, or by exemplification: count or plea in barr, &c. which wanteth substance, shall not be amended in another term, but default in the colour (because this is the default of the clerke) shall be; a record shall be amended in another term by the paper book, and a thing apparent to be the fault of the clerk shall be amended in another term, as *rien luydoit dei hoc*, &c. & *predictus fond pro quarent. nisi prius* shall be amended by this statute, if power be given to the justices to proceed, otherwise not, as if issue joyned in the record be mistaken in the *nisi prius*, it shall not be amended, but misprision of damages shall be, because this is not material to the issue, and it is the default of the clerk: warrant of attorney, and returnes are amendable by this statute, but if there be none at all, it is out of the statute; and because this statute leaveth many cases without remedy, the statutes of 32 H. 8. cap. 30. and 18 El. cap. 14. were made: ten misprisions as yet not remedied.

1. Variance material between the original and the count.

2. Want of substance in the original or count.

3. Insufficient tryals.

4. If a coroner returnes the jury where the sheriff ought.

5. Lack of name of the sheriff to the return.

6. Where no return is indorsed upon the *venire facias*.

7. When one who is not returned giveth a verdict.

8. Pleas of the crown.

9. If it appear to the court that he who hath a verdict had no cause of action.

10. Error in law.

CASES IN THE COURT OF WARDS.

Mights Case, 7 Jac. fo. 163.

1. RESOLVED, if I. M. purchase lands to him, and an infant in fee, it cannot be averred that this was to take away the wardship, because he never was sole tenant to the king.

2. No feoffment that I. M. can make of his moiety, can be averr'd to be by collusion, &c. because without feoffment no wardship shall be, and also the statute speaks of sole seisin.

3. A feoffment to the wife or younger child cannot be averred to be by covin, &c. upon construction of the statute of 32 & 34 H. 8. where collusion cannot be averred by the statute of *Marlebridge*, it cannot be now to seize all the land, but it may be for the third part which belongs to the king: if a third part be left to the king, no averment of covin may be for the other two parts: the father makes a feoffment to diverse uses, the remainder to his second son and dyeth, his eldest son dyes, the second son shall not be in ward by averment of covin.

Digbies Case, 7 Jac. fo. 165.

TENANT of the king conveys his lands to the use of himself for life, the remainder to his son and heir in tail, and after is attainted of treason, the king shall have no wardship of any part of the land by 32 & 34 H. 8. because there is no heir, and livery must be sued in the name of the heir, but the king shall have wardship in such a case before 26 H. 8. because there was an heir.

The Earl of Cumberlands Case, 7 Jac. fo. 166.

E. 2. granted the castle and mannor of S. in tail to R. C. H. 6. granted the reversion to T. C. if the tail be good, if not he grants it in possession, this is good one way or other, and so are many patents from time to time.

Paris Staughers Case, 7 Jac. fo. 168.

BY mandamus it was found that P. S. dyed seised 40 *El.* and held of the queen in common socage, 7 *Jacobi* a *melius inquirendum* was awarded, whether he held of the king by common socage, or in chivalry, and it is found that he held of the queen by chivalry. This writ of *melius*, &c. is repugnant, and giveth no authority to find this office, because a tenure cannot be of the king, in the time of queen *Elizabeth*, and therefore a new writ shall be awarded, but if the first *melius* be good, no other shall issue ; 1. For avoyding infinitenesse ; 2. A *diem clausit*, &c. shall not issue upon a *diem*, &c. nor a mandamus upon mandamus, so a *melius*, &c. shall not issue upon a *melius*, &c. ; 3. If an office be found against a subject, he shall have a traverse, and if upon that it be found against him, he hath no remedy : so the king shall have but one office, and a *melius*, and no more, although that a tenure be found of two subjects, or one hath an *ouster le maine*, the king shall not rescise without a *scire facias*.

Toursons Case, 8 Jac. fo. 170.

IF tenant of the king commit felony, 1 *Jacobi*, and after is attainted, *an.* 3. for the same, and after in *an.* 4. all is found by office. Now this office shall have relation to the time of the felony, to avoyd all mean alienations and incumbrances, but for the mean profits it shall have relation to the time of the attendor, for then the kings title appeared of record, and the like law is of an *ideot*. But in case of a ward within age, the king shall have the mean profits from the death of the auncestor, because he hath it by reason of his seigniorie, and he loseth the rent and services in the mean time ; the difference is when the king seiseth *jure protectionis regie* or *nomine districtionis*, and when *ratione prioris recti seu tituli*.

Sir Gerard Fleetwoods Case, 8 Jac. fo. 171.

SIR William Fleetwood, receiver of the revenues of the court of wards, in anno 35 Eliz. was possessed of a messuage and certain lands in Harrow, in com. mid. for a term of years, in anno 39 Eliz. he became a receiver general, and was bound in 20 obligations of 200*l.* a peece to make true account, &c. And after upon several accounts he became indebted in great sumes of money, to the queen, and being so indebted in consideration of 1,100*l.* did bargain and sell the said lease to James Pemberton, which by mean conveyance came to Sir Gerard Fleetwood. Question whether this lease, &c. was extendable and lyable to the kings debt, &c. and it was resolved, that the said sale of the term was good against the king, because the term was but a chattel, and the sale of the chattels after judgement, *bona fide*, is good, but not after execution awarded.

And Cooke, Chief Justice, said that a receiver or other accomptant which is indebted, shall not be in a worse case than a felon or a traytor, that may, after felony or treason, and before any conviction, sell, *bona fide*, for his sustenance, &c. his chattels, either real or personal.

Hales Case, 8 Jac. fo. 172.

THE heir ward comes to full age, and tenders his livery, and bargaines and sells, and dyes, the interest of the king is determined, and bargainee shall not answer for the mean profits, for the heir had done all that he could doe, and no default in him, otherwise if he had not tendred it.

Sir Henry Constables Case, 8 Jac. fo. 173.

THE son of the tenant of the king is made a knight in the life of his father, the father dyes, the son within age tenders his livery, by that the mean profits are saved, and the king shall not have the rates within age.

Virgil Parkers Case, 8 Jac. 173.

VIRGIL PARKER, seised of the mannor of *Fushell* in fee, holden of the king in chivalry of his dutchie of *Lancaster*, maketh a feoffment of the one half to the use of himself for life, and after to the use of *Mary Coney* (whom he intended to mary) for her life for her jointure, and after he married her, and then leased the other half to I. C. for years, for payment of his debts and legacies, and dyed, his heir within age. Question, whether the king should have the third part out of the mannor so leased only, or out of the whole; and it was resolved, that it shall be out of the whole mannor, although the state of the wife was precedent, that is, equally out of both parts.

THE NINTH BOOK.

Dowmans Case, 28 Eliz. com. banco, fo. 7. an assise pleaded.

THE defendant in an assise makes title by a recovery, suffered by P. V. to certain uses, the plaintiff confesseth the recovery, and saith, that it was to the use of the said P. in fee, and traverseth that it was to the uses mentioned by the defendant; the jury found that it was suffered as the defendant had alleged, and that by indenture subsequent, the intent of the parties was declared by them to be as the defendant had alleged; adjudged for the defendants.

1. Resolved, that this subsequent indenture directs the uses of the precedent recovery by estoppel against the recoveree and his heirs, and although that it be granted that a deed is requisite to the privilege without impeachment of waste, yet the estate without deed is good: no averment can be taken that the recovery was to other uses than are mentioned in a precedent indenture, otherwise in an indenture subsequent, because, if uses were declared by a precedent indenture, no declaration after shall divest them: so if P. V. had charged the land, and then had made such a declaration, this shall not divest estates of grantees, &c. but no declaration being, the uses by declaration subsequent, be divested.

2. In all actions between all persons, and in all issues, the jury may give a verdict at large, and the statute of W. 2. cap. 30. which giveth it in assise, is but an affirmance of the common law, but a jury cannot find a thing impertinent to the issue.

The death of Sir *James Eyre*, Chief Justice of the common pleas, with an ample and memorable encomium of him by Sir *Edward Coke*, &c. *vivit post funera virtus.*

Anna Bedingfeilds Case, 28 Eliz. fo. 15. in dower.

A COMMON essoyn is allowable in dowre, and the statute of 12 E. 2. is to be intended of an essoyn in the kings service, for the statute saith in prerogation of the right which is properly this essoyn, which is for a year and a day.

2. If the tenant of the king dyeth seised of diverse mannors, and it is found by office that he died seised of one, in dowre brought against the heir of full age he sueth a *circumspecte agatis*, this extends not to more than is in the office, for this writ is in the nature of an *ayde praier*, and the king hath no right to seize more than is in the office, and as to this mannor it was objected that it shall be allowed as well as if the heir be within age, for in this case, by the statute of *Prærogat. Regis, cap. 4.* that the feme may be indowed in chancery: it was answered, that by the statute of *Bigamis, cap. 4.* ayd shall not be granted of the king in that case, and therefore before the statute of *prærogat.* the king nor other lord could not indow the feme, if the heir were full of age, because he is not then gardian, and the statute of *prærogat.* giveth power to the king to indow the wife in such case, if she will, and not otherwise: where the heir pleads to dower detinue of charters, they ought to concern the same land, and this plea is to be allowed, because the feme who deteineth charters is not worthy to have dower, and also for the privity which is between the heir and her.

2. The heir ought to shew the certainty of the charters, or that they were in a chest.

3. None but the heir himself shall have this plea, nor the heir himself, if he commeth in by purchase, or if the feme had them by his delivery, nor if he comes in as vouchee having no lands in the same county, or as a tenant by receipt, because in these cases he cannot plead as he ought, that he is ready to render dower.

4. A gardian shall not plead it, because the charters doe not belong unto him, but he may plead detinue of the

ward, and if it be not restored unto him unmarried, the feme shall lose her dower, and after, the tenant waved this plea, and pleaded *unques accouple*, in loyal matrimony, and the Bishop of N. certified that they were lawfully married, whereupon the demandant had judgement.

Case of Avowry, fo. 20.

IF there be lord and tenant by fealty and rent, and the tenant make a lease for years, and the lessee hath done his fealty and paid his rent continually, and yet the lord distreineth the beasts of the lessee for the rent, and avowes upon a meer stranger as upon his very tenant.

Question, whether the lessee be without remedy, for it is a position in law, that a stranger to the avowry shall not plead, but *hors de son fee*, &c. But it was resolved, that the lessee shall be releaved, and he must allege that the lessor is seised of the tenancy, &c. and the lord shall be compelled to avow upon the tenant, and the false avowry of the lord upon a stranger, which is not very tenant, shall not hurt the lessee against the verity of the case, *quia veritas nihil veretur nisi abscondi*.

If one come to distrein for damage fesant, and seeth the beasts, and the owner chase them out, the party may not distrein them damage fesant, but is put to his action of trespassse, for the beasts must be damage feasant, at the time of the distresse taken, he who distreines for services upon fresh sute may avow upon the land by the equity of 21 H. 8. c. 19. if the lord destrein when no rent is arrear, the tenant or lessee may make rescous, and so relieve himself.

The Abbot of Strata Marcella his Case, 34 Eliz. fo. 24.

IN a *quo warranto* for claiming waifes, &c. and fellons good, &c. the defendant pleaded as to the fellons goods, that [the Abbot of S. M. *licite habuit & gavisus fuit* them until the abbey was granted to the king by 27 H. 8. and pleads also, 32 H. 8. c. 20. of reviving of privileges, of

abbies, and that the king granted a mannor parcell of the abbey, & *tot talia & tanta privilegia*, as the late A. had, to one by whom he claimed by feoffment, and pleaded not the feoffment by deed: judgment against the defendant, for the queen, it was said, that the charter of the defendant was void.

1. Because it appears not what estate the abbot had.

2. Because the defendant claimeth *catalla felonum* appendant to a mannor, because he pleaded a feoffment of the mannor, and had not pleaded it by deed, without which the privileges do not passe.

To the first the court answered that it shall be intended a seisin in fee until the contrary be shewed.

To the second no resolution, but it was resolved, that if the king grant a mannor, & *bona & catella felonum dicto manerio spectant*: these passe although they cannot be appendant.

But for the third exception, judgement was given against the defendant: in this case four things worthy of consideration.

1. That antient franchises ought to have allowance, as to that, some may be claimed by prescription without record, and some by record only, and a charter of the latter shall not be allowed, if it be before time of memory, if it be not allowed within time of memory, as allowance in eyre, or confirmation by the king, but usage will not serve, and no more shall be allowed than are confirmed: obscure words in these antient charters shall be construed according to antient usage, and not according to usage at this day.

2. A man may prescribe in franchises lying in poynt of charter, with aid of allowance in eyre, without shewing the original charter.

3. If a patent of privileges whereby they are granted in fee referre to a grant made before to one for life only, this is good, for the relation is to the quality, and not to the quantity of the estate. See there what tryals shall be allowed by law, such privileges as are antient flowers of the crown, as *bona & catalla felonum fugitivorum*, &c. if these come again to the K. they are merged in the crown, but not those which were erected and created by the K. as fairs, markets, parkes, warrens, and the like.

Bucknalls Case, 42 Eliz. com. banco, fo. 33.

IF the lord avow for other services then the tenure is traversable, if for more services of the same nature, the seisin is traversable, for he may incroach and it cannot be avoyded in avowry, if it be not for an outrageous distresse, but seisin binds not in *ne injuste vexes, cessavit*, assize, rescous, or trespassse, but in them he shall traverse the tenure, but issue in tail, successor of a bishop, &c. shall avoyd seisin in avowry, and every one may, that can shew a deed of the tenure, but none shall have a *contra formam feoffamenti*, but the feoffee or his heirs an incroachment hurteth not where there is no tenure, and if an incroachment be of payment at more dayes, if they agree in the sum, it doth not prejudice. Seisin in an avowry is not traversable generally as never seised of the services, because by that means he leaveth no remedy to the lord by avowry, but in such a case he shall disclaim or plead out of his fee, and so traverse the tenure: he who denyeth seisin after the limitation, must first acknowledge a tenure, that the lord may have his writ of customes and services, as if the avowry be for rent, fealty and sute.

Henslowes Case, 42 Eliz. fo. 36.

AN action of debt was brought against *Gage* and others as executors, one of the executors refused before the ordinary the probate, and the rest of the executors proved the testament, it was adjudged, that notwithstanding that refusal he may administer the will afterwards at his pleasure, for when many are named executors, and some of them refuse, and other some prove the testament, those which refused may afterwards administer, notwithstanding the refusal before the ordinary, but if all refuse before the ordinary, and the ordinary commit the administration to another, then they cannot prove at any time, and the executor that proveth the will ought to name every other of the executors that refused in every action for recovery of debts of the testator, and they may release the debts, duties, &c. and they which refused may have an action by

survivor, and after that executors have administred, and have once taken upon them the charge of the executor-ship, they cannot refuse at any time after.

It is holden in 2 R. 3. *tit. Testament*, 4. that it is but of late times that the church had the probate of testaments in this land, for it was given by an act, &c. and in all the nations it is not so, but in *England*, and in many places of *England*, the stewards in their courts baron have probates of testaments in their temporal courts at this day.

Lynwood, who was dean of the arches, and writ in *anno dom.* 1422, did confess the probate of testaments to belong to the ordinaries *de consuetudine Angliæ & non de communi jure*, and that in other realms the ordinaries have not so, and in another place he affirmeth that the power of the bishop in probate of testaments is, *per consensum regni & suorum procerum ab antiquo*. And I have seen a book in *Latine*, published 1573, by the Reverend Father *Matthew Parker*, Arch-Bishop of *Canterbury*, who was very learned in matters of antiquity, in these words, *rex Angliæ olim erat conciliorum ecclesiasticorum præses, vindex temeritatis Romanæ, propugnator religionis, nec ullam habebant episcopi auctoritatem præter eam quam à rege acceptam referebant, testamenta probandi non habebant, administrationis potestatem cuique delegare non poterant*. It was resolved by *Littleton*, *Newton* and *Danby*, in 7 E. 4. 14. that if all the executors refuse before the ordinary, they may prove the testament afterwards, but I think this is before the ordinary hath committed the administration, for afterwards they cannot. The executors have their title by their testament, which is temporal. But to the suing of actions in the kings courts, the judges will not admit executors for to sue, except that they shew the testament proved under the seal of the ordinary duly, but alwaies the kings courts have used to allow the probate of any of the executors to inable them all to sue actions, but the probate of the testament doth not give to them any interest or title, either to the things in action or possession, for they have all their title and interest by the testament, and not by the probate.

Power to grant administrations was granted to the ordinary, by the act of 31 Ed. 3. *ca.* 11. for before that time, when a man died intestate, the king, who is *parens patriæ*, was accustomed by his ministers to seize his goods, to the intent they might be preserved, and bestowed for the

burial of the dead, for payment of his debts, for advancement of his wife and children, (if he had any,) otherwise to his kindred, as appeareth in *Rot. Claus. de 7 H. 3. in ib. bona intestatorum capi solebant in manus regis, &c.* And after this care and trust was committed to the ordinaries, and it was resolved, *per totam cur. M. 8* and *9 Eliz. Dyer*, that the ordinary himself hath not any authority to sell any goods of the intestate, although they be in danger of perishing, neither can he release any debt due unto the intestate, by a statute in *an. 31 Ed. 3. ca. 11.* the ordinary shall depute the next and most lawful friends of the dead person intestate to administer his goods. And the statute in *an. 21 H. 8. ca. 5.* is, that the ordinary shall grant the administration to the widow of the same person so deceased, or to the next of his kin, or to both, as by the discretion of the ordinary shall be thought good, &c.

Read this latter statute, to whom administrations shall be granted.

The Earle of Shrewsburies Case, 8 Jac. fo. 46.

1. RESOLVED, that the grant of the stewardship of the mannors of M. and B. without naming the county in which, &c. is good, as if the K. grants all the lands of priors, aliens, without naming the county, but the party in pleading must name the county, and upon *non concessit* pleaded, it will appear by the evidence, and by circumstances, what mannor was granted: but if he had demanded oyer, and demurred, it will be adjudged against him, for it is matter in fact, and the acts of confirmations extend not where the county is omitted, but where the county is misnamed.

2. The grant from a day past is good, and the intent was, that the earl shall have the fees from that day, but if that cannot be, it shall be good for the time to come.

3. The earl had no power to make deputies, for three offices passe by these letters patents severally, whereof this is the middle, and to the first power is annexed to make deputies, but not to the second; the words are *habendum offic. præd.* (with such a contraction,) to that the court answered, that this *habendum* shall have relation to this office, for it is intended that the earl shall exercise this

base office by deputy, for if a sheriff shall do it, *a fortiori*, an earl; 2. Admitting that he cannot make a deputy, this *non user* is no cause of forfeiture, for true it is, when an office toucheth administration of justice, *non user* without request, is cause of forfeiture, but if he be not bound to exercise it without request, otherwise it is as here, he is not bound by the letters patents to hold courts untill he be required: if an office be private and not for administration of justice, *non user*, without damage or request, is no forfeiture; 4. Resolved, that the writ and count were good, although they were *vi et armis*, and the difference is between *non feasans*, or negligence, and *misfeasance*, that may be *vi & armis*, therefore if one bring an action upon the case, *quare vi & armis*, he hindered men from coming to his fair, which is *causa causans*, whereby he lost his toll, which is *causa causata*, and the point of the action, this is good; 5. The office not being meinorable, it is in his election to have an action of the case, or an assize, otherwise it is of land. See five exceptions taken to the verdict; *falsa orthographia*, *non vitiat concessionem*, and the difference is between writs and grants: *ille numerus & sensus abbreviationum decipiendus est, ut concessio non sit inanis*, and judgement was given for the Earl of R,

Hickmots Case, 8 Jac. com. banco, fo. 52.

IN debt upon an obligation, the defendant pleads a release, which is in these words, the obligee confessed himself to be charged of all bonds, &c. and that he will deliver all but one bond, whereupon the action is brought, which was made by the plaintiff and another.

1. Resol. these words, that the obligee confesseth himself to be discharged of all bonds, is a release, and amounteth to that, that the bonds are discharged.

2. The exception extends to all the premises, and not only to the delivery.

3. The plaintiff by confessing that the obligation was made by another, and the defendant against whom only he brought the action, had abated his own writ, and after the plaintiff was non-suted.

Batens Case, 8 Jac. fo. 53.

A *quod permittat* to abate a house levyed, *ad nocumentum liberi tenementi* I. P. and now of the plaintiff, and courts, that the house of the defendant doth juttie over the house of the plaintiff, and judgment given for the plaintiff.

1. Resolved that the plaintiff needs not shew how he had the estate of I. P.

2. The writ is, *ad nocumentum liberi tenementi* I. P. and now of the plaintiff, and counts to the *nusance* of the plaintiff only, it is good, for the levying in the time of I. P. implyeth a nuisance to him, and he must shew a nuisance to himself to maintain the action.

3. If it appear to the court that the nuisance to the damage of the plaintiff, he needs not shew it specially, as if the house of the defendant hangeth over the house of the plaintiff, as here, for it appeareth that the light was stopped, and that the rain descended: *quod constat clare, non debes verificare*, and the plaintiff may abate the nuisance if he will: and the statute of *Westm. 2. c. 24.* which giveth the *quod permittat* against the alienee of him who levyed the nuisance, extends not to the alienee of the alienee.

The Poulters Case, fo. 55.

IF one were taken for the death of a man, he was not bailable at the common law, without a writ *de odio & acia*, which serveth not if he be appealed or indicted; 2. If he be found not guilty upon the said writ, he was not bailable without a writ *de ponendo in ballivum*; 3. A writ of conspiracy lyeth not before acquittal, but the conspirators may be indicted or censured in the star-chamber. Confederacies punishable by law before execution ought to have four incidents.

1. They must be declared by some manner of prosecution, as was in this case.

2. They ought to be malicious and for revenge.

3. They ought to be false against an innocent.

4. They ought to be out of court voluntarily.

Aldreds Case, 8 Jac. fo. 57.

WHEN a man hath lawful profit by prescription of time, whereof the memory of man is not to the contrary, other custome of the like time also cannot take the former way, for the one custome is as ancient as the other. As if a man have a way over the lands of B. to his freehold land by prescription of time, B. cannot allege prescription or custome to stop the said way, for it may be, that before the time of memory the owner of the said lands had granted such a way without any stopping, and so the prescription might have a lawful beginning. 29 *El. banco regis.*

Thomas Brand prescribed time out of memory to have the light of seaven windowes towards a piece of land of *Thomas Mosely*, in the City of *York*, but *Mosely* erected a new building upon the said piece of land, so neere, &c. as the light of the windowes were stopped. *Brand* brought his action on the case, and judgement was given for the plaintiff, for it might be that before the time of memory, the owner of that piece of land did grant license to the owner of the messuage to have the said 7 windowes without stopping them, and so the prescription might have a lawful beginning.

If a man have a watercourse to his house for necessary uses, if a glover make a lime pit for calf-skins so neer the said course, that the corruption doth corrupt the same, an action of the case lyeth. 13 *H. 7.* 26. 6. Likewise a man shall not make or erect a swyne-sty so neer his neighbours house as to annoy him with the contagion thereof.

John Lambes Case, 8 Jac. star-chamber, fo. 59.

IT was resolved, that every one that shall be convicted in case of *libelling*, ought to be either a contriver of the libel, or a procurer of the contriver, or a malicious publisher thereof, knowing it to be a libel; for if one read a libel, or hear the same read, it is no publication, for before he hear or read the same, he cannot know the same to be a libel, or if he read or hear the same, and laugh thereat, this is no publication, but if after he hath read or heard the same read, he repeat the same or any part thereof in the hearing of others, or if we write a copy thereof, and doe not publish the same to others, this is no publication of the libel, but it is good for him after he hath so written the same, to deliver it to a magistrate, for then the act subsequent doth declare his intention precedent.

Robert Bradshawes Case, 10 Jac. fo. 60.

LESSOR for six years during the life of R. covenants that he had power to make this lease, the lessee brings covenant, and sheweth not that R. was in life, nor what person had right, and yet good: because if R. were not in life at the time of the lease made, the lease was absolute if he died after, yet the action lyeth, and he needs not shew who had right, for he had pursued the words of the covenant, and it lyeth not properly in his notice.

Mackallies Case, in killing of a serjeant, &c. 9 Jac. fo. 65.

FIVE exceptions to the indictment.

1. The arrest was in the night, between five and six of the clock, in *November*, at the sute of a subject, which being tortious, the killing of the serjeant is but manslaughter. *Non aloc.* 1. Because the arrest may be at the sute of a subject in the night; 2. Although that between five and six in *November* be in the night, yet the court is not bound to take notice of it, without the shewing of the party, as in case of burglary.

2. The *Sunday* is not *dies juridicus*, therefore the arrest that was made upon it was *tortious*. *Resolv.* that judicial acts shall not be done this day, but ministerial may for necessity.

3. The indictment is in *computat. in parochia* S. M. in W. omitting the ward, yet good, as if one name the town, he is not bound to say in what hundred it is ; 4. and 5. the precept was to arrest him, *infra libertates* L. and the arrest was in L. yet good, because the liberties of L. includes the City of L. itself ; 1. Exception to the verdict, that the indictment and the verdict vary, for the indictment is, that the arrest was by precept, and by verdict is found that it was by custome without precept. Answered, that the precept is but circumstance, and variance in that it is not material, having found the substance, as if the indictment be, that he killed him with a dagger, and it is found that it was with a sword, so if he be indicted of murder, and it is found man-slaughter, this is good, for *ex malitia* is but circumstance ; 2. The indictment may be general, *ex malitia*, &c. because the law implyeth malice, and so the precept not material ; 3. The custome is not good, to arrest one without summons : it is good, and if the process be erroneous yet killing of him who did execute it is murder, because he is not to dispute whether it be good or not, and if any officer in doing his office be slain, this is murder, and in such a case an officer is not bound to flye to the wall, as another is ; 4. The arrest cannot be before the plaint entered of record before the sheriff. *Resp.* It may by the custome after entry of it into the porters book.

4. The serjeant ought to shew at whose sute the arrest is, and in what court, and for what cause, true it is, if the party submit himself, but here he was killed before he could speak, and if they kill him before the arrest, knowing that he came for that purpose, this is murder.

5. It is not found that the killing was felony. *Resp.* It is sufficient for the jurors, to find the killing, which is the substance, and leave it to the judgement of the court if it be felony.

6. The serjeant did not shew his mace : he ought not.

1. Because he was commonly known.

2. The party arrested is to obey at his peril, and if shewing of the mace be requisite, it will be a warning to the party to flie.

7. The arrest ought to be upon request after the plaint entered; the request may be before or after.

8. The verdict is repugnant, for they find that the plaint was entered of record, 17 Nov. and after they found that it was 19 Nov. this is more strong against the prisoners, because the entry was before the arrest 18 Nov.

9. The plaint is without form, this is not to the purpose, for it is but a remembrance to draw the count by at large after. And *Mackalley* and the other prisoners were executed at *Tyborne*.

Peacocks Case, 9 Jac. in camera stellata, fo. 70.

SIR *George Reynell*, plaintiff, *Richard Peacock* and others, defendants, J. H. J. B. commissioners to examine *Peacock* upon inter. and *Peacock* being examined would have declared all the truth, but J. H. a commissioner for the plaintiff, held him strictly to the inter. so as the truth could not appear: and this was holden by the lord chancellour, and the two chief justices, the chief baron, and all the court of star-chamber, a great misdemeanour, &c. as the statute of *Exceter* saith, *per quod justitia & veritas suffocantur*, and commissioners to examine ought to be indifferent, and by all meanes to express the truth. And they are not bound strictly to the letter of the inter. but to every thing also that ariseth necessarily for manifestation of the truth. And the said J. H. when he was in examination of *Peacock*, went forth of the place to the plaintiff, being in another roome, and had secret conference with him: and it was holden by all the court, that a commissioner, before publication of the despositions, ought not to discover to any of the parties the matter thereof, nor after that he beginneth to examine interr. to conferr with the parties, to take new instructions to examine further than he knew before: and if he did, they were great misdemeanours, and punishable by fine and imprisonment, for if such things should be suffered, perjury would abound. I. H. was put forth of the commission of the peace, and the attorney general was required to preferre an information against him, for the said misdemeanours.

Doctor Husseys Case, 9 Jac. fo. 71.

IN ravishment of ward against a feme covert and others, they were found guilty, and the baron *non culp*: and the age of the infant above sixteen, and married: *Foster* and *Warberton*, a feme covert is within the statute, because the action lay at the common law, and the statute gives, but greater punishment, and so she is within the statute of *Merton*, cap. 6. *De malefactoribus in parcis*, of forcible entry, and redisseisin. *Cooke* and *Wamsley* to the contrary; the statute of *Westm.* 2. cap. 35. hath made these alterations, this extends to heirs females, which the statute of *Merton* did not; 2. It extends to heirs ravished after years of consent, so doth not the statute of *Merton*; 3. It extends to the clergie, the statute of *M.* doth not; 4. *M.* giveth a right of ward, this giveth ravishment of ward; 5. This giveth more speedy processe, and the death of the plaintiff or defendant abateth not the writ; 6. It giveth greater punishment; 2. A feme covert is not within this statute, for it is *si hæredem maritaverit, & satisfacere non potuerit abjuret regnum*, or be perpetually imprisoned, and because the law disableth the feme to satisfie, she shall not therefore be exiled nor perpetually imprisoned, and the baron being innocent shall not be punished, for the punishment is personal, and he shall not have judgement at the common law, the action being brought upon the statute, nor judgement upon the statute where the action is brought at the common law; 3. The verdict is insufficient, because no case is within the statute, except the ravishor marry the infant, so that if the infant marry himself, or be married by another, it is out of the statute, and the verdict found that he was married, and did not say by whom; 4. Damages shall be recovered upon this statute, and where the statute saith, that he shall be banished, or perpetually imprisoned, the election is in the court.

Combes Case, 9 Jac. fo. 75. upon a special verdict.

A copy-holder in fee (where there is no custom to that purpose) maketh two his attorneys, to surrender to the use of I. N. in fee, they in court shew the letter of attorney, and by the said letter of attorney surrender.

1. Resolved, surrender by letter of attorney is good, for a surrender may be by the common law without custome, and may be by attorney as incident to it: if one have a bare authority, coupled with a confidence, he cannot do it by attorney, as executors cannot sell by attorney, but if he had authority to dispose, as owner of the land, he may as *cestuy que use*, by the statute of 1 R. 3. but if one had particular personal power to dispose, as owner of the land, he cannot do it by attorney, as if lessee for life had power to make leases for 21 years. There are personal things which cannot be done by attorney, as homage, fealty, beating his villein: admittance of him to whose use the surrender is made may be by attorney if the lord will, and yet he may upon the admittance compel the tenant to do fealty, *à fortiori* here: and otherwise it would be a mischief, for it may be he is beyond the sea, or sick, and cannot be present, to surrender for payment of his debts, or preferment of his children, but if a custome be that an infant may make a feoffment at 15 years, he cannot do it by attorney.

2. The attorneys have pursued their authority, although they have not done it in the name of the authorizer, for they did shew the letter of attorney, and surrendered by authority thereof, which is all one; but if it be to make a lease by indenture, this shall be in the name of him who gave the authority, but executors must sell land in their own name for necessity, and yet the vendee is in by the devisor.

Henry Beytoes Case, 9 Jac. com. banc. fo. 77.

IT was resolved, *per tot. curiam*, that accord in all actions, wherein is supposed the tort to be made, (*vi & armis.*) where *cap.* and the exigent lyeth at the common law, is a good plea, as in trespass, and *ejectione firmæ*, detinue of charters, house, or other goods, for where the certainty is to be recovered an accord is a good plea, when the condition in a deed by the original contracts of the parties, is to pay mony, yet by accord and agreement between the parties, any other thing may be given in satisfaction of the mony, *res per pecuniam estimatur & non pecunia per rem.* And in this sense the saying is true *quod pecunia obediunt omnia.*

Every accord ought to be plain, perfect, and compleat, for if diverse things are to be observed and performed by the accord, the performance of part is not sufficient, 17 E. 4. 2. & 6 H. 7. 10. *Pl. Com. 5.*

If a man be bound in an obligation, in one hundred quarters of wheat, upon condition to pay 58 quarters, he cannot give money or other thing in satisfaction thereof, because the contract originally was not for money, but for a collateral thing.

Also if the things to be performed be at a day to come, tender and refusal is not sufficient without actual satisfaction and acceptance.

If a man be bound in a statute, recognizance, or obligation, and after a defeasance is made to pay a lease sum, now this sum in the defeasance is collateral, and therefore if the obligor tender the same at the day, and it is refused, the obligee shall lose the same for ever, as is holden in 33 H. 6. *fo. 2.* and yet in this case, the obligor by accord between the parties may give any horse or other thing in satisfaction of the money in the defeasance, for the contract originally was for money. But if a man by contract or *assumpsit* without deed be to deliver an horse, or to build an house, or to doe any collateral thing, money may be paid by accord, in satisfaction of such contract, for as a contract in consideration may commence by word, so by accord, by words for any valuable consideration, the same may be dissolved.

Agnes Gores Case, 9 Jac. fo. 81.

WHEREIN was resolved, that if A. put poison into a pot, to the intent to poyson B. and set the same in a place where she supposeth B. will come and drink thereof, and by accident one C. unto whom A. had no malice, commeth, and of his owne will taketh the pot and drinketh thereof, of which poyson he dyeth, this is murther in A. for the law coupleth the event with the intention, and the end with the cause. But if one prepare rats-bane to kill rats or mice, and lay the same in certain hidden places to this purpose, and with no ill intent, and another person finding the same doth eat thereof, and dyeth, this is no felony; but when one prepareth poyson with a felonious intent to kill any reasonable creature, whatsoever reasonable creature is killed thereby, he that had the felonious intent shall be punished. Resolved by all the justices of *England*.

Coneys Case, 9 Jac. fo. 84. in banco.

THE lord of a mannor, and tenant within the age of 21 years by fealty and rent, the lord infeoffeth a stranger; to which feoffment the tenant attourneth. Question, whether the attournement of an infant will bind him to the payment of the services or not, and by *Cooke, Walmsley, Warberton* and *Foster*, it shall bind, for he is compellable in a *per quæ servitia*, and shall not have his age, but he may avoid any prejudice thereby at his full age: and if a fine here had been levied, he had been compellable: and the rather because it is but a bare assent.

Pinchons Case, 9 Jac. fo. 86.

IT was adjudged, that an action of the case will lye against executors, for a debt due by the testator upon a simple contract. An action upon assumpsit made by the testator was maintainable against the executors, upon a contract for corn. *Norwood and Reads Case, Plow. Com. 181.*

Debts upon simple contracts ought to be paid before legacies, and reasonable part of the goods of the wife or infant, which proveth that they still remain; the spiritual court doth give remedy for payment of legacies; and the reason of all this is, for that the testator in his life time, upon his action of the case upon the *assumpsit*, might not wage his law, as he might have done upon his action of debt: for no action is maintainable against executors, where the testator might have waged his law in his life time; if a prisoner do eat and drink with his gaoler and dye, the gaoler shall have an action of debt against his executors, for the meat and drink of the testator; and the reason is, for that in this case the testator might not wage his law, as is adjudged, 27 H. 6. fol. 46. in *Thomas Bodulges Case*, and the reason that no wager of law in this case is, because that every gaoler ought to keep his prisoner *in salva & arcta custodia*, and thereby the gaoler is in a manner compelled to find victuals for his prisoners, and therefore the prisoner may not wage his law; but if A. contract with B. for his commons for a month, &c. there, in an action of debt brought against A. he may wage law.

If a victualer, or common inne-keeper bring an action of debt for victuals delivered to his guest, the guest may wage his law, for the victualler, or host, is not compellable to deliver victualls until he be paid for them in hand, 10 H. 7. 8. in anno 4 H. 6. R. G. brought an action of debt for 10 markes against *Thomas Timberhull*, and others, executors of *William Webb*, and declared, that the testator had detein'd the plaintiff to be with him for a year in the art of limming of books, paying *per annum* ten markes: and *Martin* did hold opinion that the action was not maintainable against executors, and he took diversity between this case of a limmer, and of a common labourer, for the labourer may be compelled in spite of his head to

serve, and his wage is put in certainty by the statute, and it is no reason the servant should lose his wages by the death of his master, whom he was bound by the law to serve, but in case of a limmer, he is not bound by the law to serve, & so when he makes a covenant it is his own act and folly, and not the act of the law, for he might have taken a specialty, and the opinion of *Martin* in this case is good law : but the true reason of this diversity is, because that in this case of the common labourer, the testator might not wage his law as he might against a limmer, and this appeareth in 11 *H. 6. fol. 43.* where the gardian of *freres minors in Coventry*, brought an action of debt against *John Burton of Coventry*, executor of *John Goate*, and declared that the said *John Goate* retain'd at *Coventry frere John Bredon*, a brother of the said house by licence of the said gardian to sing for him masses for one whole year, and to say *Saint Gregories* trentals in the next year after, and shewed in certainty upon what services *Saint Gregories* trentall did consist, taking for this xls. *per annum*, and within four dayes *John Goate* dyed, and the defendant his executor, and the said *John Burton* granted to the said *frere* to pay him the said sum, for doing the said services according to the retainer of the testator, which divine services the *frere* did perform according to the retainer, and all his wages were Arr. And in this case the diversity was taken that a labourer may have an action of debt against executors, without specialty, because that he may be compelled to serve by the statute, and the testator shall not wage his law in this case. But the priest or *frere* is not bound to sing masses, by the law, against will. And in every case where the testator might have waged his law, the action is not maintainable against his executors without specialty, for executors may not wage the law upon the contract of another. In 2 *H. 4. f. 16. Lawr.* *Saint Martin* retained one for term of his life, in the time of peace and wars, 100s. *per annum*, which service he (as his servant) did do for two years, for which he brought his action of debt against *John Belton*, and others, executors of the said *Lawr.* And judgement was given against the plaintiff, for the reason, and upon the same diversity, as is aforesaid; an *assumpsit* without specialty is no more personal then a covenant by specialty, and therefore dyeth not with the person.

William Banes Case, in ban. re. 9 Jac. fo. 93.

UPON an action of *assumpsit* against executors, the plaintiff needeth not to averr that the executors have assets in their hands of the goods of the testator, to the value of the said debt, for it shall be intended, *prima facie*, that they have assets, for the law doth presume that the testator will not leave a greater charge upon his executors, then he will leave benefit to discharge.

If a stranger do say unto a man to whom a debt is owing *I pray you forbear your debt, and do not sue the party until Michaelmas, &c. and then I will pay you the debt.* This is a good consideration, although it be no benefit to him that made the promise for it; it is a damage to the creditor to forbear his sute or debt; he may have his action of *assumpsit* against such a stranger after the day.

Sir George Reynels Case, 9 Jac. fo. 95. in chancery.

IT was found by office, by commission under the great seal, that the marshal of the kings bench had committed diverse forfeitures of his office, by suffering voluntary escapes of prisoners; that office, and such like may not be granted for years, because it is an office of trust and personal, and he must continually attend, and be sworn in court.

Two matters of record amount to an office, as in the case of Sir *John Savage*, who was sheriff of the county of *Worcester* for life, by letters patents under the great seal, and was indicted of two voluntary escapes of felons: and the king may seize his office into his own hands, without suing forth any *scire facias*, 5 *Mar. Dyer*. The Abbot of saint *Albanes* had a gaol, and detained prisoners therein, and because he would not be at charges to sue forth commission for the gaol delivery, the king caused his franchise and libertie thereof to be seised into his own hands.

The Abbey of *Crowland* had a gaol and prisoners, and for that he once detained men that were quit of felony, the king resealed the gaol for ever.

If a man grant an office to another for life or for years, and he will not doe his office, or otherwise misuse his office, the grantor may rescise the said office. 39 H. 6. fo. 34.

If a gaoler commit voluntary escapes, or permit them, this is a forfeiture of his office, *Cooke, Lib. 9.* in the countesse of *Salops. Case.*

The king may grant the custody of the gaol to one in fee, and also to the sheriff of a county, to one and his heirs, which estate in fee simple includes all other estates, and it is true that these grants may be made by law, for in these cases there is not any intermission, for presently after the death of the ancestor the office descends to the heir.

2. This office cannot be forfeited by outlary, as if it were granted for years, it might; grants of these offices in fee, or for life, have been allowed, and approved, but such grants for years were never allowed or approved, *et periculosum existimo quod bonorum virorum non comprobatur exemplo*: he that hath the custody of the gaol, whether by right or wrong, shall be charged with escapes of prisoners untill he be actually removed.

Margaret Podgers Case, 10 Jac. fo. 104.

I. P. copyholder for life, the remainder for life, the lord bargained and sould, and levied a fine to I. P. this descended to M. P. who levied a fine, five years passe without claim of them in remainder; adjudged no bar.

1. Resolved, that copy-hold estates are within 4 H. 7. by the word *interest*, but if the word be by *covin*, this barreth not the issue, if lessee for years, or copy-holder be ousted, the lord shall not have five years after a fine levied by the disseisor, after their estate determined, because he may presently have an assize, otherwise where lessor for life is ousted: a meer stranger cannot enter to avoyd a fine without commandement, or assent of the party who hath right, but a gardian in socage, or lessor for life, or lord of a copy-holder may, for the privity between them and the infant or lessees.

2. A fine barreth not any by non-claim who is not put to a right, therefore here they in remainder are not barred,

because the bargain and sale, and fine to the tenant in possession putteth them not to a right.

1. Because it is lawful act.

2. Tenant in possession devesteth not the remainder by acceptance, as if lessee for life accept a fine, *come ceo*, although it be a forfeiture.

3. Because he is in by 27 H. 8. of uses which doth no wrong.

4. After the bargain and sale he in the next remainder shall not enter, for by the custome his estate was to commence after the death of the tenant in possession, so if tenant in possession forfeit, the lord and not he in remainder shall enter, but thereby without a special custome the remainder is not destroyed: If a copy-holder in fee surrenders to the use of one for life, no more passeth then serveth the estate limited, and he shall pay no fine for admittance after the death of tenant for life: it seemed to the chief justice; that if the lord here had charged the land, I. P. shall not hold it charged, for the estates in remainder preserve him from incumbrances of the lord.

Meriel Treshams Case, 10 Jac. com. ban. fo. 108.

AN administratrix, defendant in debt, pleads that the testator and his son acknowledged a recognizance to the king of a hundred pound, and another of 800*l.* to B. and another of a 1,000*l.* to M. and divers others, over and about which she had not assets, and after said she had not sufficient assets; the plaintiff replyeth, that the recognizance to B. was for payment of 400*l.* which is paid, and the other to M. is to perform covenants, whereof none is broken; and the recognizance remaineth in force by covin of the defendant.

1. Resolved, that the bar is insufficient; for she first confesseth that she had sufficient assets to pay the said recognizances, and after denyeth.

2. She said she had assets, but not sufficient; this is too general, but she must confess how much she had, because she had knowledge thereof.

3. The pleading by the plaintiff, that the obligation was made to perform covenants, is good without more certainty, because he is a stranger.

4. The general allegation of covin is good, without shewing of refusal to release, &c. and fraud may be in one only, also the bar is insufficient, because the intestate was bound in the recognizances with another, and the defendant had not averred that the other had not satisfied them.

Robert Marys Case, 10 Jac. fo. 111.

A COMMONER being a copy-holder brings an action upon the case, for putting beasts into the common, whereby he lost his common, the jury found that the defendant did not put in the beasts, but they of themselves depastured there.

1. The jury have found the substance of the issue for the plaintiff, the depasturing there; and it is not material if he put them not there.

2. This action lyeth for the commoner, for he may distrein damage feasant, and it may be, that with strong hand he is hindered to distrein, and so if he shall not have this action he is remediless.

2. A commoner, who had freehold in the common shall have an assize; *ergo*, a copy-holder shall have this action.

3. The wrong ought to be so great that the commoner lose his common, as a master shall not have an action for beating his servant without loss of his service, and it appeareth not to the court that there are more commoners than he, and if there be, yet an action lyeth, because each had private damage, and it is not like to a common nusans, which shall be punishable only in a leet, if there be not special damage, but be the trespass never so little, the lord may have an action of trespass.

The Lord Sanchers Case, 10 Jac. fo. 117. for procuring the murder of John Turner, master of defence.

1. RESOLVED, that a baron of *Scotland* shall be tried by commons of *England*.

2. The indictment of the accessory in one county to a felony in another county, by the statute of 2 E. 6. c. 24. shall recite that the felony was done in the other county, for an indictment is no direct affirmation of the fact.

3. The justices of the kings bench are, within these words of the statute, justices of gaol delivery, or *oyer and terminer*, for they are the supream judges of gaol delivery.

4. The Lord *Sancher* cannot be in the term-time arraigned in *Midd.* before justices of *oyer and terminer*, because justices of *oyer and terminer* shall not sit in the same county where the kings bench is, but the principals were arraigned in L. in the term-time, because this is another county.

5. There needs not be 15 days for the return of the *venire facias*, upon an indictment in the same county where the kings bench is, otherwise in another county.

6. Because there is no direct proof that the Lord S. commanded one of the principals, but that he associated himself to one who was commanded, the best way is to arraign him as accessory, to him whom he commanded, but if he be indicted as accessory to two, and found accessory to one of them, this is good.

The word appeal in the statute of W. 1. c. 14. is to be intended generally, (*viz.*) by indictment, by writ or bill, &c. and attainders is to be intended upon any such accusation; *ergo*, if upon any such accusation the principal be attainted erroneously, the accessory may be arraigned, because the attainder is good until it be reversed, but if the accessory be hanged, and after the attainder against the principal is reversed, the heir of the accessory shall be restored to all which his father lost, either by entry or action: by 5 H. 4. cap. 10. none shall be imprisoned by justices of peace, but in the common gaol; whereby it appears that justices of peace offend, who commit felons to the counters in L. and other prisons, which are not common gaols.

CASES IN THE COURT OF WARDS.

Anthony Lowes Case, 7 Jac. fo. 122.

A. L. tenant of 59 acres, parcel of the mannor of A. by chivalry, and sute of court to B. whereof A. was parcel, and both A. and B. were parcel of the Duchie of L. out of the county palatine holden formerly of the king in chivalry, *in capite*, and of another house there, holden of A. by fealty and rent, H. 8. grants the rent by release to him, and confirmeth his estate of the said lands by fealty only, and grants to him the mannor of A. *tenendum* by fealty and rent: it was objected that when the king grants the seigniori to his tenant, the ancient seigniori is extinct, and a new one that is best for the king created, (*viz.*) chivalry; 2. When he extinguisheth services parcel of the mannor of A. this shall be holden as the mannor of A. is, this is by chivalry.

But resolved, that the 59 acres and house shall be holden by fealty only, and as to the said objection the release of the king doth not extinguish service, which is inseparable to a tenure that is fealty, but all others are gone, and true it is, when the king grants and expresseth no tenure it shall be by chivalry, but when the land moveth from a subject, and the tenure is changed, the new tenure shall be as neer the ancient as may be, as feoffee of tenant in *frankalmoigne* shall hold by fealty only, and here, although they grant the services, yet he limits the grantee to doe fealty. A knights fee is not to be taken according to the quantity, but the value of the land, as 20*l.* *per annum*, and a hide of land is as much as a plough can plough in a year; relief is the fourth part of the annual value; that is, of a knight, five pound; of a baron, a 100 markes; of an earl, 100*l.* of a marquesse, 200 marks; of a duke 200*l.* The eldest son of E. 3. called the black prince, was the first duke in England, Robert, Earl of Oxford, in the reign of R. 2. was the first marquesse, and the Lord Beaumont was the first viscount, created by K. H. 6.

Floyers Case, 8 Jac. fo. 125.

BARON and feme seized of lands holden in chivalry in the right of the feme in fee, levy a fine to one who grants and renders to them and the heirs of the baron, and levy another fine to their use for life, the remainder to their three sons in tail, one after another; the remainder in fee to the heirs of the baron; the king shall have neither wardship of body nor land.

1. *Resol.* That is out of the statute of 32 *H. 8. cap. 2.* if he who had the fee dye, &c. in respect the estate by the first fine did not continue, and this although both the conveyances are voluntary.

2. The king shall not have wardship of the third part, because it is not for advancement of the wife, for in the first fine the land moved from her, and she had no more by the second fine than by the first.

3. In regard of the particular estate is out of the statute, no wardship accrueth to the king, by advancement of him in the remainder; but if a reversioner upon an estate for life, convey to the use of his wife, this will give wardship of the body of the heir, for he in reversion is tenant; if a lease for life be the remainder to two, and to the heirs of one, he who hath the fee dieth, his heir shall not be in ward; if the heir of one joint tenant, who had the fee dye of full age, (living the tenant for life, his heir shall not be in ward, although he be within age by that statute, because he is not immediate heir.

Sondays Case, 8 Jac. fo. 127.

M. S. deviseth to his wife for life, the remainder to W. S. and if he shall have issue, that then his issue shall have it, the remainder to S. the remainder to T. &c. *totidem verbis*, upon condition that if any of them, or the heirs of their bodies, go about to alien, that he in the next remainder to enter after the death of M. W. and S. T. suffereth in a common recovery to his own use in fee, he the next remainder enters.

1. Resolved, every one of the sons hath an estate tail; 1. These words, if he dye without issue male, are sufficient to create an estate tail; 2. The general clause, if any of his sons, or heirs of his body do it, maketh it manifest; 3. The condition proveth it, for they cannot alien if they have but for life, for this would be a forfeiture.

2. The restraint of the tenant in tail to suffer a common recovery is void: see *Mildmayes Case*, in the sixth book.

Quicks Case, 9 Jac. fo. 129.

THE king lord, I. N. and *Tho. Q.* mesnes of a manor which they hold in common *in capite*, & tenant of three acres holden in chivalry, T. Q. maketh a feoffment of his moiety to the use of himself for life, the remainder to I. Q. his son in tail, the tenant infeoffeth I. Q. who infeoffeth T. Q. to defraud I. N. of the wardship of his son within age, and dies, I. N. seiseth the son, T. Q. dyeth, the king shall not have wardship of the body, and moiety of the three acres.

1. Resolved, by the death of I. Q. it was a chattel vested in I. N. and the king had but a possibility to have it, if T. Q. die during the minority of the ward, which possibility shall not divest the wardship out of I. N.

2. When the tenant infeoffeth a stranger to defraud the lord of wardship, the lord shall not have ravishment of ward, before recovery of the land in the right of ward, and although the title of I. N. be but in action, yet it shall not be divested by a descent after: see the statute of 34 H. 8. in case of collusion.

Bewleys Case, 9 Jac. fo. 130.

THE king lord, mesne by socage, and tenant, the tenant is attainted of treason, the king grants to one, *tenendum* by chivalry and rent, and to doe his services to other lords, the tenant shall hold by socage of the mesne, and he by socage of the king, because the intent of the king was to revive the mesnalty, which cannot be by any other way, and the reviving of the ancient tenure shall be in construction preferred before the reservation of a new; and the honour of the king shall be preferred before his profit, and there was no default in the mesne.

Thomas Holts Case, 9 Jac. fo. 131.

GRANDFATHER tenant in chivalry *in capite*, father and son, the grandfather conveyeth part of his lands to the use of the father and his wife, the remainder to the son in tail, &c. the remainder to the right heirs of the grandfather, and conveys other lands to his younger children for life, with diverse remainders over, and dyeth, the father tenders livery, and before he sueth it dyeth.

1. Resol. by the death of his father before livery sued, and after tender, the king loseth the primer seisin, but not mean rates, if any be due.

2. The son shall not pay primer seisin, nor sue livery, because the father and not he, was within the statute of 32 H. 8.

3. If the king had had one primer seisin, he shall not have another of the lands conveyed to the younger children, but that ought to be an effectual seisin; *ergo*, here, because the king had not the effect of the primer seisin of the father, he shall have primer seisin of the lands conveyed to the younger children, as if he had the grant of a prochein avoidance and presents, and the clerk dyeth before induction, he shall present again, and before the statute of *donis*: if a tenant in tail the reversion to the king had aliened *post prolem suscitata*, with warranty

which descends upon the king, it is no bar without assets, the effect of the warranty.

4. The king shall not have primer seisin in regard of a secke reversion which descends to the son, otherwise if a rent be reserved, the king may have that for a year: so note for a fruitlesse reversion there shall be wardship, but no primer seisin.

Mathew Mences Case, 9 Jac. fo. 133.

TENANT of the king of a messuage in capite, who holds other gavel-kind land, deviseth all to his 4 sons equally; 1. Whether the king shall have a third part of a messuage only; 2. Whether out of the part of the heir only; because the *prærogativa regis, cap. 1. rex habebit, &c. de quocunque tenuerint, &c.* is intended, if the land descend to the same heir to whom the land holden did descend.

1. Resolved, if no will had been made, the king shall not have the lands holden of others in socage, but when by the will, (to which he is inabled by the statute,) he deviseth it to his sons, there the saving in 32 H. 8. giveth to the king ward and primer seisin; so if lands in chivalry devisable by custome, are devised to the feme, although the devisee be good, for all without aid of the statute, yet the king shall have the wardship of a third part.

2. The king shall have his third part out of all their estates equally.

Ascoughs Case, 9 Jac. fo. 134.

THE king lord, mesne in capite, and tenant in socage, the mesne grants to the use of himself for life, the remainder to the tenant in tail, if the remainder suspends the mesnalty during the life of the mesne.

Resolved, that during his life the mesnalty is not suspended; 1. Not as to the mesne, because he remaineth tenant to the lord, nor by reason of the remainder, for the avoiding of fractions, otherwise if the remainder be limited in fee, for then he hath as high an estate in the mesnalty as in the tenancy, and this can never be revived,

and otherwise a seigniorie in fee shall issue out of the mesnalty for life, and there will be the lord and tenant in fee, and mesne for life; but if the lord grant his seigniorie for years, the remainder for life to the tenant, the mesnalty is suspended: at mesnalty or seigniorie cannot be suspended in part, and *in esse* for part by the act of the party, but they may by act of law, or of a third party: as if the lord take a lease of part of the tenants, all the seigniorie is suspended, but if a gardian indow the feme the seigniorie is *in esse* for that part, and suspended for the residue: if two coparceners are of a seigniorie, and one commeth to the tenancy by defeasable title, the other shall distrain for the moiety of the seigniorie, and the act of the coparceners shall not prejudice her.

There are four manner of avowries.

1. Upon his very tenant.
2. Upon his very tenant by the manner, where the tenant had but a particular estate.
3. Upon his tenant by the manner when the lord had but a particular estate.
4. Upon the matter in the land, as within his fee, but the lord hath liberty to avow according to the commonlaw.

Thoroughgoods Case, 9 Jac. fo. 136.

TENANT in fee infeoffeth one by deed indented, and delivereth upon the land, in the name of seisin, this is good, and hath a double operation at one instant, *viz.* to deliver the writing as a deed, and to deliver seisin of the land according to the deed.

1. Resolved, this is his deed although he doth not say so but delivers it in the name of seisin, for delivery is good without any word: if one deliver a deed to one as an escrow, to be his deed upon performance of condition, this is his deed presently, otherwise if he deliver it to a stranger: so words are good without actual delivery, as if he saith, take it like to a livery within view. If the obligee deliver the obligation to the obligor to deliver, the obligor may retain it, for the words to redeliver are void.

2. Delivery of the deed upon the land amounteth not to livery and seisin, but it doth if delivered in the name of seisin; so of any other thing, or if he saith, I deliver you seisin, without delivering any thing, this is good also.

Beaumonts Case, 10 Jac. fo. 138.

I. B. and E. his wife, tenants in special taile, the remainder to the heirs of the baron; I. B. levies a fine to K. E. 6. who grants to the Earl of H. in fee. I. B. dyeth. E. enters; the Earl of H. confirms her estate, to have to her and the heirs of the body of I. B. E. dyeth seised, having issue F. B. who accepts a fine, *sur conusans de droit tantum*, with proclamations, and dies, having issue sir H. and I. Sir H. in ward to the king after full age, and before livery, covenanteth to stand seised to the use of himself, and his heirs males of his body, and dyes, having issue only a daughter in ward; whether she or I. B. shall have the land, &c.

1. Resolved, that E. had an estate taile, and the statute of 8 H. 7. c. 24. which enableth the baron to barr the issue, saveth the right of the feme if she enter, or, &c. and one may have an estate taile which cannot descend, as if the son in the life of the father levyeth a fine, the father remaineth tenant in taile still, although it cannot descend, and E. here hath an estate taile so long as she liveth, or the heirs in taile remain.

2. The confirmation is void, for he who did confirm had but a possibility, which passeth not by the confirmation, and if he had a reversion in fee, yet it should be voyd.

1. Because the taile which the feme had was confirmed, which cannot descend.

2. The confirmation doth not adde a descendible quality, where he who should have it is disabled to receive by descent.

3. This would in effect repeal 4 H. 7. & 32 H. 8. two of the principal pillars of the law.

4. & 5. If tenant in dower grants her estate, there is a descendible quality in the heir, to bring wast against tenant in dower, and although the heir confirm her estate for life, and after she assigneth it to I. S. who committeth waste, yet the action of waste is maintainable against her, *pari*

ratione, in the case at barre, in regard the confirmation doth not enlarge the estate of E. it cannot adde unto it a descendible quality.

6. There are but three manner of confirmations, *viz. perficiens, crescens, aut diminuens*, and the confirmation in this case is none of them : and if E. had no power to levy a fine, or suffer recovery, the reason is, because she cannot barr that which was barred before by her husband, but this point was not now in question.

THE TENTH BOOK.

The Case of Suttons Hospital, Baxter, plaintiff, Sutton and Law, defendants, in trespass in the kings bench, and adjourned into the exchequer chamber; and judgement given against the plaintiff, fo. 23.

1. *Object.*

By the parliament 7 Jac. the hospital was founded at *H.* in *Essex*; *ergo*, the incorporation made after by the kings letters patents is void, and the *charterhouse* is not given by the said statute, because S. purchased it after.

2. *Sutton* who had licence to found an hospital before the foundation dyed.

3. The K. cannot name the house and lands of S. to be an hospital, because in *alieno solo*.

4. Every corporation ought to have a place certain, but here the license is to found an hospital at or in the *charterhouse*; *ergo*, before that S. had made it certain, there was no incorporation; also the place of corporation ought to be certain by meates and bounds, and a place known will not serve.

5. The king intended to make an incorporation presently, which cannot be before that S. name a master.

6. Governours cannot be, untill there be poor in the hospital; *ergo*, S. calleth it in his will his intended hospital.

7. The foundation cannot be without the words *fundo, erigo*, &c. and before such foundation a stranger cannot give lands unto it.

8. The master was named at will, where he ought to be for life, and have freehold in the land, also the hospital must be founded before a master be named.

9. The bargain and sale made by S. is void.

1. Because the money paid by the governours, in their private capacity, shall not inure to them in their politick capacity.

2. The *habendum* is to them upon trust, which cannot be in a corporation.

3. Because as before no hospital was founded.

10. The king cannot make governours of a thing not *in esse*.

To the first it was answered, that the letters patents recite the preamble of the act, whereby, and in many parts of the act, it appeareth that the incorporation was to be *in futuro*, when it shall be erected, and the statute doth not give any lands unto it, but power to give without licence of alienation and mortmain, and it appeareth by the letters patents that the erection precedes the license.

2. The license is to him, his heirs, executors, &c. at any time hereafter, and the words of incorporation are in the present, and so the incorporation precedeth the execution of this license.

3. Although the king gave the name, yet *S.* devised it, and assented to it, and the *K.* did it at his sute.

4. The *K.* makes an hospital of all the premises, so that it is certain, and as to that which was said that a place uncertain cannot be an hospitall; it was answered, that a manor may be, which is more uncertain than the *charterhouse*. To the essence of a corporation five things are requisite; 1. Lawfull authority to incorporate, and that may be four ways by the common law, as the king himself by authority of parliament, by the *K.* charter, and by prescription; 2. The persons either natural or political; 3. A name by which, &c. 4. A place; 5. Words sufficient, but not restrained to a strict forme.

5. A corporation may be without head, as if the *K.* incorporate a town, and give to them power to choose a major, they are a corporation before election.

6. It is a sufficient incorporation that there be an hospital *potestate*, for the temple was a corporation in the time of *H. 1.* And yet was not built till *H. 2.* time; but here the house was built before.

7. The first donor is in law the founder, and when the *K.* giveth a name, and designs the place and the persons, the founder hath nothing to doe but the donation; but if the *K.* leaveth the nomination to the party, there many times, although not of necessity, he useth the words *fundo, erigo*, &c. But in truth the incorporation is made by the *K.* charter, and the founder is but an instrument.

8. The master may be at will; for by the letters patents *S.* had power to name one at his will and pleasure.

9. The money paid by some of the governours in their private capacity is good, but the payment was as governours, and so they are acquitted; 2. A rent was reserved, which is a good consideration; 3. A bargain and sale may be upon confidence and trust.

10. They may plead that they are seised *in jure incorporationis*, although then it be not *in esse*. In answer to the presidents, some are explanatory, some nugatory, *ex consuetudine clericorum*.

Sir Thomas Fleming, Chief Justice of England, became sick, whereof he after dyed, so that he never argued the case: See there is several advancements and commendations.

Mary Portingtons Case, 11 Jac. fo. 35.

AFTER many things said concerning perpetuities, in this case it was said that a recovery in a value barreth an estate tayl, although no recompence be had, because it is by judgment, as if issue in tayl be barren in a formedon, by warranty and assets, but if the issue before judgement given alien the assets, his issue shall recover the land in tayl; if tenant in tayl suffer a recovery, and dye before execution, issue is barred: it is absurd that one may barre one of going about to suffer a recovery, when he cannot barre the recovery itself; but if such a condition had been good, a feme covert by that shall not lose her land; for she shall not lose her land by any conclusion without examination upon writ in court; and if she acknowledge a recognizance, this is void, although it be with her husband, because there is no writ to examine her; if an infant levy a fine, this is voidable, and shall be tryed by inspection, but a fine levyed by a feme covert is void, if the husband enter, otherwise not.

Jennings Case, 38 Eliz. banco regis, fo. 43.

TENANT for life suffers a common recovery, in which he in remainder in tayl is vouched, who dyeth, the reversion in fee is barred.

1. Resolved, that at the common law a recovery against tenant for life, upon a true warranty, and recovery in value, binds him in the remainder.

2. No statute was made to provide for him who had a reversion or remainder upon an estate tayl, and the statute of *W. 2. c. 3.* which giveth receipt to a reversioner upon default of him who holds *per donum*, is to be intended of tenant after possibility of issue extinct, and *32 H. 8. c. 31.* provides only for a reversion or remainder upon a lease for life.

3. There have been divers evasions out of the statute of *32 H. 8.* as if lessee for life lease for years to one who infeoffeth one, who in recovery vouches lessee for life, this was out of the statute, because the lessor and lessee were put to a right, whereupon *14 Eliz. c. 8.* was made.

4. *14 Eliz.* extends not where lessee for life vouched him in remainder in tayl, because it is in the power of him in remainder to dock the reversion, &c. and the course is, that tenant in tayl bargains and sells to one who suffers a recovery, in which tenant in tayl is vouched, and yet the bargainee had but for life: judgement affirmed in error.

Lampets Case, 10 Jac. fo. 46.

LESSEE for 5,000 years deviseth for life to one whom he makes executor, the remainder to one sister, and the heirs of her body, and dies, the sister taketh husband, they release to the executor who demiseth for ten years to the defendant, the baron dies, the executor dies, the feme takes another baron, who demises to the plaintiff, judgement against the plaintiff.

1. Resolved, a devise of the use of a term to one for life, the remainder to another for life, is good as an executory devise.

2. A devise of the term it self in such manner is good.
3. The first devisee cannot barre him who had the executory devisee.
4. Assent of the executor to the first devisee, is an assent for all.
5. If such a devise be made to the executor, and he enter, generally he shall have it as executor.
6. Such an executory devise cannot be granted over.
7. Such an executory devise may be extinguished by release to the first devisee.

Object. That the first devisee had all the interest in him, and the other but a possibility, which cannot be released, as if conusee of a statute release his right in the land, yet he may sue execution.

It was answered, that a thing in action cannot be granted to a stranger, neither by the act of the party, nor of law, but it may be released to the terretenant, and here to him who had the present interest ; 1. Because it may be easily created, being a chattell, so it may be easily determined ; 2. Every right as well present as future, by joyning all who have interest one way or other, may be extinguish'd ; so if the executor and the sister here had joyned in an assignment, this had been good ; 3. When many things are requisite to the perfection of any thing, the law respects the original act, and here the fundamental acts were the devise, death of the devisor, the assent of the executor, and death of the first devisee, and she hath a right that may be released, and the death of the executor is but a mean to bring it into possession ; as a feme covert barreth her self of dower by joyning in a fine with her husband, but if the baron sole levy a fine, and dyeth, and five years passe, the feme is not bound ; so if tenant in ancient demesne levy a fine, he had possibility to have the land again, if the lord bring a writ of deceit ; but he may release that possibility, but such a possibility as may be released, ought to be *propinqua*, and not *remota*, and it is more than a common possibility that an executor will die before 3,000 years, and the person who releaseth it ought to have it in certain ; therefore if a remainder be limited to the right heirs of I. S. his eldest sonne cannot release it, because he is not certain whether he shall be heir at the death of his father ; so if a lease be made to baron and feme, the remainder to the survivor of them for 21 years, the baron cannot grant this term ; 4. This by her

death goeth to her executor, therefore it may be extinguished by her, if the disseisee release all actions to the disseisor, who dyes, the disseisee shall have a writ of entry against his heir, or if bailor release all actions to the bailee, he shall have a detinue against his executors ; 5. It is a present legacy, although the interest be *in futuro*, and therefore the legacy may be discharged, and consequently the interest it self, for *qui destruit medium destruit finem*, and this may be before assent of the executor ; 6. Otherwise there would be a perpetuity of chattels.

2. By this release the executor had a perfect estate for 5,000 years absolutely.

3. The request and acceptance of the release by the executor amounteth to an agreement.

The Case of the Chancellour, Masters and Scholars of the University of Oxford, 11 Jac. fo. 53.

THE statute of 2 *Jacobi* giveth presentments of churches, which belong to recusants; convicted to the chancellour and scholars of O. and makes grants of such recusants void : one indicted of recusancy grants a prochein avoidance, & is after convicted, the church becometh void, the chancellour, masters and scholars, bring a *quare impedit*, and averre that he remained a recusant.

1. *Resol.* The grant of the next avoidance betwixt the indictment and conviction is void, for the statute is, that a recusant convicted shall be disabled, &c. from the time of the session of the parliament; so a grant of the next avoidance by an abbot before surrender, and after the statute of 31 *H. 8. cap. 13.* of monasteries is void; so if an officer of the king purchase land, and alien it, and become indebted to the king, this land is lyable to the debt.

2. Covine shall not be presumed if it be not averred, and if the jury find that covine was to one intent, that shall not be taken to another intent, therefore because it is not said that this grant was by covine, it shall not be intended.

3. Although the statute giveth the avoidances to the chancellour and scholars of O. yet they may bring a *quare impedit* in the name of their corporation, and the misnaming of the corporation doth not avoid the act when it appeareth what corporation is intended.

2. It was pleaded that the statute giveth it to the chancellor, master and scholars, and the defendant had demurred upon it.

3. This being a private act, it shall be taken as it is pleaded.

4. The university must shew that the grantor was a recusant, convicted at the time of the avoidance, but not that he continued so, because it is a chattell vested in them, which shall not be divested by his conformity after. Judgment for the plaintiffs.

The Bishop of Salisburie's Case, 11 Jac. fo. 58.

THE defendant in a second deliverance, pleads a grant of the Bishop of S. to E. G. and himself of the office of surveyorship of his mannors, with a rent charge of twenty nobles *per annum*, with confirmation of the dean and chapter, and that it is *antiquum officium*, used to be granted in such manner to such person and persons as the bishop and his predecessors shall please: the plaintiff pleads the statute of 1 *Eliz.* and that the said office hath not been used to be granted but for the life of one, whereby the grant is void, *et hoc paratus est verificare*: It was excepted to the barre, that the avowant had pleaded that the bishop and his predecessors have used to grant the said office to such person or persons, &c. And the plaintiff pleads in barre, that it had not been used to be granted but for one life, and concludeth, *& hoc paratus est*, &c. where it ought to have been *quod inquiratur per*, &c. yet it is good, because the avowry is in the disjunctive.

2. It is not averred that the bishop is dead, and if he be not, the grant is good during his life, it is good, for it appeareth by the words *nuper episcopum*, that he was dead, or remov'd, exceptions to the avowry, that to say this is an ancient office is too general, because he made title to the office it self, but it had been good if he had claimed another thing by reason of the office, and the exception holden good: it was objected, that this grant was out of the statute of 1 *Eliz.* because no parcel of the possessions of the bishoprick, as the statute speaketh.

2. Such things are restrained by the statute whereof a rent may be reserved.

3. If it had been an office, parcel of the bishoprick which the bishop might exercise, this had been within the statute, but this is not so.

4. If it be restrained for two lives, then also for one life : but it was resolved, that the said grant for two lives was void against the successor by the statute of 1 *Eliz.*

1. *Resolv.* This grant had been good at the common law, by confirmation of the dean and chapter.

2. The act of 32 H. 8. cap. 28. inableth the bishop to make a lease for 21 years, or three lives, observing the limitations of the statute, without the dean and chapter.

3. The statute of 1 *Eliz.* restraineth the bishop to grant any parcel of his possessions, or any thing belonging to his bishoprick, but for 21 years, or three lives, &c. but against the bishop himself it is good, and this office may be said belonging to his bishoprick, because he had an inheritance in the disposition of it, and the intent of the statute was to avoid diminutions and dilapidations, therefore a grant of such an ancient office of service and necessity for one life, as was accustomed, is out of the statute ; but more than that he cannot doe, because it is not of necessity ; and the death of one of them in the life of the bishop is not to the purpose ; for the grant was void against the successor, and it shall not be made good by accident after.

4. Such a grant for one life, without confirmation of the dean and chapter, is void, because it is out of the statute of 1 *Eliz.*; and resolved also, that although the bishoprick be new, yet a grant of a necessary office, with a reasonable fee, (of which the court shall judge,) bindeth the successor.

Nota. Where there was a clause in 1 *Eliz.* that bishops may grant to the queen, &c. 1 *Jacobi* by parliament restraineth them, and after judgement was given for the plaintiffs.

Whistlers Case, 10 Jac. fo. 63. upon a special verdict.

BEFORE the statute of *prærogativa regis, cap. 15.* by the grant of the king of a mannor, all appendants (without naming them) passe, and the statute excepteth knights fees, advowsons and indowments, but all other appendants now passe without naming them, and so do advowsons passe in case of restitution, for the statute speaketh of grants, and in grants also, without expresse mention by the words *adeo plene & integre, &c.* See other good matter there, touching this subject.

The Church-Wardens Case, of St. Saviours in Southwark, fo. 66.

QUEEN Elizabeth leased the rectory to the churchwardens of St. S. for 21 years, and after leased to them for 50 years, in consideration of the payment of 20 pound, and surrender of the letters patents by the churchwardens, *modo habentes, & ad præsens possidentes*, and the special verdict found that they paid the 20*l.* and that they delivered the charter in court to be cancell'd, and that they paid the fees, but that no vicar was made, yet the grant is good ; for it appears that the intent was not to make a surrender in deed, because he saith *modo possidentes*, but a surrender in law by acceptance of the second letters patents, and although a corporation cannot make a surrender in deed, yet they may make a surrender in law.

2. Although an actual surrender is requisite, they have done all which belongs to them by delivery of the charter and payment of the fees, and the cancelling belongs to the court.

3. Although it was recited that 20*l.* was paid, yet it needs not to be found, for it is but in the personalty, and is affirmed by the king to be paid, and is also executed : See *Barwicks case, 5, Report. 93.*

The Case of the Marshalsea, 10 Jac. fo. 68. in false imprisonment.

AN action upon the case upon an *assumpsit* is brought in the *marshalsea*, whereas no party was of the king's house, the plaintiff recovered, the defendants arrested the plaintiff by a precept, in the nature of a *capias ad satisfaciendum*, and he brings false imprisonment, and judgement given against the defendants.

1. Resolved, the steward and marshal at the common law hath two authorities: one general, as vicegerents of the chief justice in his absence, within the verge: another, as judges of the *marshalsea*. This last was limited to debt and covenant, where both are of the house, and to trespass *vi & armis*, where one is, but not if it concern land, and because they have the general authority at will, and the other for life, they draw many cases to the *marshalsea*, which ought to be in other courts: their jurisdiction by *Fleta, lib. 2. cap. 2. Infra metus hospitii continentis 12 leucas in circuitu*. And the statute of 13 R. 2. c. 3. limits the 12 miles to be accounted about the king's townell.

2. The reasons, wherefore this special authority was given them, were,

1. Because the suite there is by bill, by reason of their privilege, which cannot be elsewhere.

2. In respect of the necessity of attendance of the king's servants.

3. If strangers shall be suffered to sue there, one carman would sue another carman there, *in aula regis*, which were undecent, but the general authority vanished by the act of 28 E. 1. c. 5. which ordained that the chancellor and justices of the king should follow him, therefore *in presentia majoris cessat*, &c. and about 4 E. 3. the court of K. bench became resident.

3. The statute of *articuli super chartas*, is as much as an explanation of the great charter, and the charter of the forrest, & not introductory of a new law; and the third chapter of that act explains the jurisdiction of the *marshalsea*, as before, and if he hold plea, otherwise a prohibition lyeth, and the party shall have an action upon the case as a consequent upon the statute.

4. That part of the statute which giveth them jurisdiction in trespassse, shall be intended trespassse *vi & armis*.

5. This action lyeth against the defendants, because the court had not jurisdiction, and so have not done it by command of the judge, otherwise if the court had jurisdiction, but proceedeth *inverso ordine*, or erroneously, as if a *capias* be awarded against an earl, &c. one who is indicted before justices of the peace cannot approve; 1. Because he cannot assigne a coroner; 2. Because it is out of their commission if a court leet be holden at another day than it ought to be, the proceeding is *coram non iudice*, otherwise it is of a court baron, 6 R. 2. action upon the statute *plac. ultimo*, in the point, that judgment in the marshalsea, when none of the parties is of the K. house may be avoided by plea without any writ of error, which proveth that it is void.

Leonard Lovies Case, 11 Jac. fo. 78. in *ejectione firmæ*, for 8 acres, &c.

L. L. seised of diverse mannors in soccage and in chivalry: *in capite*; maketh a feoffement to diverse uses; in an indenture precedent, whereby he limits to himself for life, without impeachment of waste, and to the use of his lessees and devisees, the remainder to his second son in tayl, &c. the reversion to himself with power of revocation, after he purchaseth 8 acres in soccage, and revoketh, as to certain mannors holden in soccage, and deviseth them and the 8 acres to his eldest sonne, and the heirs males of his body for 500 years, provided that if he alien otherwise than for years, determinable upon the deaths of three persons, or lesse number, rendring the old rent, or die without issue male, then to his second son in tayl, with proviso to make leases according to 32 H. 8. only; L. L. dyeth, the eldest sonne enters into the 8 acres, and dyeth, leaving one daughter, who married R. D. who enters into the 8 acres, &c. second sonne dyeth, having L. L. who enters upon R. D. and leaveth to the plaintiff, who enters, upon whom the defendant enters, and ejecteth, &c. and if the entry of L. L. the lessor was congeable or not was the question; and it was adjudged that his entry was not lawfull, and judgement was given against the plaintiff.

In this case diverse points resolved, some at the common law, and some upon 32 and 34 H. 8. of wills.

1. Resolved, if a man seised of three acres of equal value, one holden *in capite*, and giveth that and one of the other to his younger son in tail, he cannot devise any part of the third acre, because he had executed his power, and if he purchase other land in socage, he can devise but two parts of that, by reason of his reversion *in capite* expectant upon the estate tail.

Object. That the K. was once satisfied of the wardship by the statute, in respect of the acre holden, and the reversion thereupon shall not hinder the devise of land purchased after.

2. The statute doth not regard this seck reversion, but inheritances of annual value. *Resp.* To the first that this reversion shall hinder the devise, by the words of the statute, for he had a reversion of lands holden, but although the statute saith that he may alien two parts, by act executed or will, if he alien to one of the three uses by act executed, he may devise the reversion, for the statute is to be intended of an entire alienation, and where the statute saith in reversion or remainder, it is to be intended that the devisor be seised of such a remainder which draws wardship.

To the second it was answered, that things which of their nature are seck, are out of the statute, but not things which of their nature are of annual value, but are not of value in respect of some lease or gift, *abq. abliquo inde reddendo*, and therefore seck reversions are devisable by the said statutes; but if they be not, yet they shall not hinder the devises of other lands: to make one able to devise by those statutes, the time of having, holding, and disposing must concur, and therefore if a grant to the second son here, had been in fee, although with power of revocation, the devise had been good, because he had no lands *in capite*, at the time of the devise if the father conveyeth his land to the use of his younger son, the eldest being within age, after the death of his father, he shall be in ward, although nothing descend: A true child, and not in reputation is within the statute, and if the son purchase land *bona fide*, of his father, this is out of the statute, because it is not for his advancement; if tenant in socage devise, and after purchase land in chivalry, the devise is void for a third part, but if tenant in

chivalry and socage devise all, and after aliens the land holden, this is good. To make division, that the king shall have a third part holden, the lands shall be taken according to their value at the time of the death of the devisor. The time of provision that a third part must descend, needs not concur with the time of alienation, but it is sufficient that he had it at the time of his death. The estate to any of the three purposes ought to continue to the time of death, and the tenure must continue till after death to make it within the statute; and the estate also of lands holden, ought to continue after death, therefore if tenant in tail *in capite*, devise socage land, and die without issue, this is good, so privity must continue after death, therefore if he who made the conveyance be attainted, this is out of the statute: The uses to the second son are in contingency, and not executed by 27 H. 8. by the power to make leases, and devise reserved to the feoffor, and therefore the fee is in the feoffor in the mean time, so that having disposed of it, and being seised of it, he cannot devise the land purchased after.

It was objected, that the statute saith lawfully executed in his life, but here no use was to be executed in the second son untill after his death.

It was answered, that after his death the uses were derived out of the feoffment, and so are as it were executed in his life.

It was holden by the chief justice, that the remainder to the second son is contingent in regard no alienation is found to be made by the eldest, and if there had been, then it would be repugnant that after alienation the land should remain to the second son, and so *quacunq. via data*, the remainder (as the case is) cannot vest in him, but this point was resolved by the court. 2. The revocation is good although the indenture precedeth the feoffment, and that the uses are in contingency, and that the revocation is but in part, and the chief justice held that the eldest son had but a term determinable, and the second an estate tail, but in this the kings bench and common pleas differ in opinion, and that if lands be devised to one and the heirs of his body for 500 years, the executors shall have it and not the heir; and the devisee may alien it, for it cannot be entailed, and so in *Peacocks Case*, 28 El. *banco regis*, was it resolved.

Doctor Leyfields Case, 8 Jac. fo. 88. in trespass.

IN trespass for corn taken at O. C. The defendant pleads Q. Eliz. granted the rectory of O. C. to C. P. without shewing the letters patents, who demised to G. P. for 8 years, if the said C. P. so long live, and that he, as servant of C. P. took the corn, and avers the life of C.; the plaintiff demurreth, because the plea amounteth to the general issue, and it was adjudged in the K. bench that the bar was insufficient, because the defendant shewed not the letters patents, and error was brought in the exchequer chamber, because the plea amounts to the general issue, because the defendant gave no colour wherein judgement ought not to be given against the defendant, but only to answer over.

2. Because he is not bound to shew the letters patents.

It was answered, that colour shall not be given, for colour shall not be given where the plea goeth to the bar of the right, for it would be in vain to give colour of right, and to bar him if he had right, as if a collateral warranty, fine, statute be pleaded, or if he claims by a waif, otherwise where he pleads a descent, for this doth not bar the right, but the possession; he who claims by sale in a market overt shall not give colour if he pleads generally, but if he pleads that I. S. was possessed as of his own goods, and sold them as in a market overt, or waived them, there he shall give colour, because he confesseth no interest in the plaintiff.

2. If the defendant claims by the plaintiff, he shall not give colour.

3. If the plea be to the writ, or action of the writ, no colour shall be given.

4. Colour shall not be given in case of tithes, for to whomsoever the lands belong, the tithes belong to the parson.

1. Colour ought to be a doubt to the laygents.

2. It must have continuance.

3. It must be such a colour that, if it be effectual, will maintain the action.

4. It ought to be given by the first conveyance.

2. Resolved, lessee for years of lessee for life of the K. must shew the letters patents, for he who is privy in

estate or interest, or who justifieth in right of a party or privy, although he claim but part, must shew the first deed, and the reason that deeds are showed to the court is, that the judges and jury (that which respectively to them belongs) shall judge of the sufficiency thereof, therefore a deed shall not be suffered to be given in evidence by witnesses, or copy, except it be burned, or some such inconvenience, but a copy of a record is good evidence: if a release be made to tenant for life, this inureth to the reversioner, yet he cannot plead it without showing, *a fortiori*, here because the lessee may contract with the lessor to suffer him to have the deed to shew; but strangers who claim not the thing granted, nor interest out of it, need not to shew the deed; otherwise if he claims the thing granted, or interest out of it; *ergo*, the second grantee of a rent charge must shew the first grant, but he who claims as guardian, or merely by the law, without privy or power of providing the deed, need not to shew it: but tenant by the courtesie must shew it, because the deed was in his power living the wife, otherwise of tenant by statute, &c.

3. The not shewing of the deed is matter of substance, therefore judgement shall be given against the plaintiff in the writ of error, although it was not shewed as cause of demurrer. And judgement was affirmed.

Nota, when a plea amounts to a general issue, if the plaintiff demur specially, upon 27 *Eliz.* and the defendant joyn, judgement shall be given for the plaintiff.

Edward Seymors Case, 10 Jac. 40. 98.

THE Lord *Cheyne* tenant in tail, the remainder in tail to I. C. the reversion to the Lord C. bargains and sells, and levies a fine to the bargainee, with warranty to him and his heirs, the bargainee infeoffeth the Lord S. who infeoffeth E. S. I. C. dies, having issue T. the Lord C. dieth without issue, *Edward*, Lord S. leaseth to the plaintiff, the defendant by the command of T. ejected him: and judgement was given for the defendant, and affirmed in error.

1. Resolved, the bargainee had an estate descendible, during the whole life of the bargainor, (whereof his wife shall have power,) and also the reversion in fee expectant upon the remainder in tail.

2. The fine after bargain and sale is no discontinuance of the remainder, for this operates upon the estate passed by bargain and sale, and corroborateth that, and maketh it determinable only upon the death of the bargainor without issue, otherwise if the fine had preceded the bargain and sale.

3. It was objected, that the feoffment of the bargainee displaceth the remainder, so that the warranty which descends upon him barreth him : but resolved, that the warranty doth not bind him.

1. Because it was annexed to an estate determinable by the death of tenant in tail, without issue, and to the reversion in fee, granted by the bargain and sale, and fine, and not to the remainder in tail, and the conisee by his own act cannot make it to extend any further ; therefore the estate tail being determined, the warranty ceaseth.

2. A warranty barreth not an estate which is not displaced at the time of the warranty annexed, as if the father maketh a feoffment of land (out of which his son hath a rent) with warranty, this binds not the son as to the rent.

3. The feoffment was lawfull, because he had fee, therefore he cannot make discontinuance.

4. A warranty cannot enlarge an estate, the remainder in tail to I. C. was not discontinued, for the feoffor was not then seised by force of the tail.

5. A collateral warranty may be given in evidence, if it be not pleaded, for although it giveth not a right, yet it barreth anothers right, and the rather in an *ejectione firma*, and other personal actions, because in them it cannot be pleaded by way of bar.

Note, there are some titles to which a warranty extendeth not, as in case of mortgage, mortmaine, consent to a ravishor ; for in these cases no action lyeth, in which voucher or rebutter can be, neither shall a descent take away an entry.

Brewsages Case, 10 Jac. common pleas, fo. 99.

THE sheriff upon a *feri facias* executed did take an obligation of the defendant to pay the money in court at the return of the writ, and this was adjudged good, notwithstanding the statute of 23 H. 6. Before this statute the sheriff could not let any person to bail which was taken *ad responden.* as may appear *Fitz. Na. Br. 25. a. & b.* and in 34 Eliz. in debt by *Dawson*, sheriff of B. against *Burnam*, upon an obligation, the defendant pleaded the statute 23 H. 6. and shewed that one K. recovered debt and damages against him, and pursued one writ of *feri facias* against him, directed to the sheriff of B. and that he made the obligation to the plaintiff for the execution, and that the obligation was void by the statute, whereupon the plaintiff demurred, and it was resolved,

First, that the obligation was not within the statute, because that the statute extended only to such obligations which any who is in their ward did make unto him.

Secondly, that the same obligation was not void at the common law, whereupon the plaintiff had judgement, and another judgment, 28 El. *Inter Burwey & Kett*, upon an obligation, taken by the sheriff, *pro solutione pecunie debite domine regine*, upon extent out of the exchequer.

Now it is said in the latter clause of the act, that if any of the sheriffs or other officers or ministers aforesaid, take any obligation in other form, by colour of their offices, that it should be void, &c. There are two manner of forms, (*viz.*) *forma verbalis* & *forma legalis*, for *verbalis* stands upon the letters & syllables of the act, *forma legalis*, is *forma essentialis*, and stands upon the substance of the thing to be done, and upon the sence of the statute, *quia notitia ramorum hujus statuti, non in sermonum foliis sed in rationis radice posita est*, and according to this distinction this branch of this statute is to be expounded, and therefore in 37 H. 6. 1. if the sheriff take a single obligation of one in his ward that was bailable, this was void, for this obligation wants essential form, prescribed by the statute: for the condition prescribes the fault, which is part of the substance. And there *Moyle* said, that if the sheriff let one to bail or mainprise, that is excepted in the statute, and not mainpernable, and take a simple obligation, that the same is void, *quod alii justiciarii concesserunt*,

for by the exception it appeareth that it was not the intention of the statute that such should be let to bail, and therefore the obligation is taken in another sense than the statute intends. And it seemeth to me, that as well in the same case of 37 *H. 6.* as in the principal case of *Dive and Manningham, Plow. 67.* the obligation which had the condition to save the sheriff harmless (when the sheriff against the law putteth one to bail who is not bailable) is against the law, and void by the common law. And with this accordeth *William Wishams Case, 15 Eliz. Dier, 224.* and in 7 *E. 4.* One was in custody of the sheriff by force of a *capias*, upon an indictment of the trespass, and the party maketh the obligation to another, by the direction of the sheriff, upon this condition, as the statute prescribes for the surety of the sheriff, &c. and there it is holden that the obligation is void, because the statute prescribes that the obligation shall be made to the sheriff, and that is part of the essential form; and so if the sheriff adde to the condition that he shall be kept harmlesse against the king and the plaintiff, &c. this is void; so if a gaoler or a sheriff take an obligation of the person, with condition to be true prisoner, or to pay for his meat and drink; so if the sheriff adde any thing to the matter prescribed by the statute, as to pay such a sum of money for a horse, &c. this condition maketh all the obligation void, for it is taken in another form (touching the substance of the matter) than is prescribed in the statute, but in *Pasch. 27 Eliz.* in the kings bench, in an action of debt brought by Sir *William Drury*, late sheriff of *Suffolk*; upon an obligation of 20*l.* against A. B. it appeared that the defendant was solely bound in the same, and with condition that one *Moore*, whom the sheriff had arrested upon a *latitat*, should appear in person at the day contained in the writ, the defendant pleaded the statute 23 *H. 6.* and that the obligation was made in other form than is mentioned in the statute, whereupon the plaintiff demurred in law, and it was objected that there were three variances from the statute, *viz.* one in the obligation, and two in the condition. First, in the obligation, for that there was but one surety, and the statute prescribes reasonable surety of sufficient persons in the plural number, having sufficient within the said the county, &c. in which case there ought to be two sureties at the least, and the plural number cannot be satisfied with the singular number, and so contrary to the

word of the statute. And so was the opinion of *Mountague*, Chief Justice of the common place, in the case of *Dive* and *Manningham*.

Also in the condition that the prisoner should appear in person, where the words of the statute are, that he should appear (generally) without these words, (in person.)

2. That he should appear at the day, &c. *ad respondendum*, where these words *ad respondendum* are more then the statute prescribes, and therefore the objection is voyd, &c. but it was resolved by Sir *Christopher Wray*, Sir *Thomas Gaudy*, and all the court, that the obligation was not voyd by the said act.

For to the first ; the words reasonable surety of sufficient persons are added for the surety of the sheriff, and therefore if he will but take one surety, be it at his peril, for he shall be amerced if the defendants appear not ; and therefore the statute doth not make void the obligation in this case, for the same branch that requires form, requires also that the obligation shall be made to the sheriff himself, by the name of his office, and that the prisoners should appear, in which clause no mention is made of the sureties, so as the intent of the act was, that in so much as it was at the peril of the sheriff to leave to his discretion to take one or more for his indemnity, and although the sureties have not sufficient within the same county as the statute mentioneth, yet the obligation is good : for these words of the act (as to this point) are more for counsel or direction of the sheriff, then for precept or constraint to him, and that for the safety of the sheriff ; for if the defendant cannot find two sufficient persons having sufficient within the same county, the sheriff is not bound to let him to baile, and this resolution agreeth with the antient rule, *quilibet potest renuntiare juri per se introducto*. And as concerning the second additions to the condition of the said obligation, more than is in the statute.

It was resolved, that true it is there is a verball difference of the form prescribed by the statute, but not in the substance and effect, for he that is so letten to baile ought to appear in person, for so much is implied in the words of the act, (shall appear,) and by the common law every tenant or defendant ought to appear in proper person ;

and with this accordeth *Fitz. Na. Br. 25.* and he that ought to appear, ought to appear *ad respondend. & parum differunt quæ re concordant, & est ipsorum legislatorum tanquam viva vox rebus & non verbis legem imponere, vide Dyer, 21 Eliz. 364.* where the condition was in the conjunctive, (appear and answer,) and yet the obligation good, *27 Eliz. in Darby & Hethcot*, if a gaoler or sheriff, for ease or enlargement of any prisoner, take promise to save him harmless, that although the statute speaketh only of obligations with condition, yet it is an equal mischief. And *Wray*, Chief Justice, said, that the statute should serve for small or nothing, if the premises should not be taken to be within the statute, and the latter clause is generall, *viz.* if the sheriff take any obligation in the other form, that it shall be void, and within the equity of these words, (any obligation) an *assumpsit* is comprehended, for the antient verses are,

*Verba ligant homines, taurorum cornua boves,
Cornu bos capitur, voce ligatur homo.*

Quando verba statuti sunt specialia, ratio autem generalis, generaliter statutum est intelligendum: it was said, that the *assumpsit* did not bind the prisoner at the common law, because the consideration was against the law; *vide Dyer, 19 Eliz. Oneleyes Case.*

Alfridus Denbawds Case, 10 Jac. fo. 102. in error.

ONE of the jury only appeared at the assizes to try an issue in trespass, a *tales de circumstantibus* is awarded at the prayer of the plaintiff; the title of which was, *nomina decem talium*, and verdict and judgement was given against the defendant, who brings error.

It was objected, 1. That the judgement was erroneous, for the title being *nomina 10 talium*, the sheriff cannot return 11.

2. Because the statute speaketh with these persons that were before impannelled, which cannot be satisfied, where one only appeareth, as the statute of *Westm. 2. c. 11.* is not satisfied with one auditor, so of the statute of *Merton, c. 3.* of *redisseisin*: it was resolved, that the *tales* was well

awarded, for the statute shall be taken beneficially in favour of speedy trials, and the title is the misprision of the sheriff, which shall be amended.

The time of granting the tales is when so many of the jurors make default that the inquest cannot be taken; if two of the principal pannell appear, and at the prayer of the plaintiff twelve *de circumstant.* are returned, and then the two principals are withdrawn, now the trial shall be all by the 12 *de circumstant.* but the Lord *Dyer* made a *quere* of that, if one of the jurors dye before the verdict be given, a tales shall be granted, he who is meerly a defendant cannot pray a tales untill default be made by the plaintiff; the number ought to be under the number in the principal pannel, except in an appeal, because there the defendant may challenge peremptorily: the number shall be diminished in every new tales, and they ought to be of the same quality with the former, as if the principal pannel were *per medietatem linguæ*, so shall the tales be: justices of assize shall not award a tales *de circumstantibus* in an assize, for the statute of 35 H. 8. c. 6. speaketh where the trial is *habeas corpora, distringas, or nisi prius*, for an assize cannot be taken by *nisi prius*, but must be taken in the proper county; and after, by advice of all the justices of the common place, and barons of the exchequer, the judgement was affirmed.

Humphrey Lofields Case, 10 Jac. fo. 106. in debt upon bond.

D. leased for a year to H. L. and if the parties shall please to renew the term at the end of that year, that he shall have for three years, tendring 40*l.* *per annum*, H. L. bindeth himself to perform covenants, and faileth of payment of 20*l.* at christmas quarter, D. bringeth debt: it was resolved for the plaintiff. It was objected against the action,

1. That the reservation was upon a contingency, if the term shall revive.

2. Because the reservation is *durante termino predicto*, viz. the last term,

3. The reservation shall be taken strictly, because the words of the lessor.

But it was resolved, that the reservation extendeth to the first year, for the proper place of a reservation is after the limitation of the estate; as if a lease be made with divers remainders over, reserving rent; this goeth to all; and although the second term be in contingency, yet the first is certain, and *termino prædicto* signifieth both the terms, for it is *nomen collectivum*, and the reservation shall be taken reasonably, according to the intent of the parties. Tenant in tail of an acre in borough *English*, and of another by the common law, by an ox, dieth, having issue two sons, the service shall not be increased: and increase is only between very lord and very tenant, for there may be increaser, but not where there is a reservation; or if the seigniorship be by deed, and services are reserved within time of memory, for he shall have no more than himself reserved: in the case at bar in respect the obligation was forfeited, the court moved the plaintiff to take his arrearages, costs, and damages, with which he was contented, and so no judgment was given.

Arthur Legats Case, in subversion of pestilent patents of sheevish concealors, 10 Jac. 109. in com. banco.

THE king *ex certa scientia*, &c. grants fifteen acres as concealed, which were parcel of a manor of the profits, whereof the king was answered: nothing passeth.

1. *Resolv.* If the king were answered of the old rent of the manor, and the fermors, &c. suffer one to intrude in part, this is not concealed; 2. The grant is void; for *quæ quidem*, &c. is the suggestion of the party.

2. This is a clause of restraint, and nothing passeth which is not concealed.

3. The king did not intend to diminish his revenue, which will be if the grant be good.

4. The clause *quæ quidem*, hath a double conjunctive, *concelata & detenta*, and land cannot be detained from the king.

3. *Ex mero motu*, &c. aideth it not.

4. If the officers of the king may by matter of record have notice of putting the land in charge in court of record, and do it not, yet this is not concealed, and if the clause *quæ quidem* be added for more certainty, the grant shall not be vitious by it if it be false; as if a manor be

granted, *quod quidem*, was in the tenure of I. S.; where it was not, this is good: if one substract or take the kings rents, this is not concealed, for the king may charge him as bailly, and the law will make a privity: see the statute of 4 H. 4. cap. 4. called in the *Rolle Brangwyn* in English *White Crow*. And it was said that perpetuities, monopolies, and patents of concealment, were born under one unfortunate constellation, for as soon as they came in question, judgement was ever given against them, and none ever for them, and they have all two inseperable qualities, (*viz.*) to be troublesome and fruitless.

Robert Pilfords Case, 10 Jac. fo. 115.

THE plaintiff in trespass counts to damages of 40*l.* and at the *nisi prius* the jury assessed for damages 49*l.* and 20*s.* costs, at the day in *banke* he released 9*l.* parcell of the damages, and had judgement of 40 and 10*l.* for costs *de incremento*, the defendant brings error, because the damage and costs surmount the sum in the count; but judgement was affirmed; for in reall actions before the statute of *Glocester*, 6 E. 1. cap. 1. no damages were recoverable, but in personal actions and mixt they were, and by that statute a man shall have costs in all cases where he recovers damages, *viz.* before, or by the same statute; therefore if after this damages are given where they were not at the common law, costs shall not be recovered, as in a *quare impedit*; but if a statute after this give double or treble damages, where damages and costs were by the common law, there the plaintiff shall recover the damages increased, and costs also; but in waste against tenant for life, costs shall not be recovered, for although this statute was at the same parliament, yet it was an act of creation, and therefore no costs: and true it is, that damages include costs, in a general sense, but in the count it is taken for damages, before the action brought in a relative signification; therefore *expensæ litis* may be added to it, although he count not of them, as a man shall do in real actions without counting of them, because he shall recover them pending the writ, in *entrie sur disseisin*, the plaintiff shall recover damages from the disseisin to the writ of

inquiry, &c. and if the issue be tryable by verdict, &c. to the verdict, but in a *præcipe* of rent of his own possession he shall recover all arrears to the judgement: judgement affirmed by all.

Cheyneyes Case, 10 Jac. fo. 118.

IN a *valore maritagii*, issue is joined upon the tenure, and found for the plaintiff, but the jury did not inquire of the value: adjudged the verdict is sufficient and shall not be supplied by a writ of inquiry.

1. In this writ three things are to be recovered, the value, damages and costs, and although the issue be joined upon the tenure, yet as a consequent upon the issue, and their charge they ought to inquire of the value, if they find for the plaintiff; as in an assize, if issue be joynd upon a release, and found for the plaintiff, yet the recognitors must inquire of the seisin and disseisin, and this defect shall not be supplied with a writ of inquiry, because then the defendant would be prevented of his writ of attain: but if the court ought to inquire of things whereof no attain lyeth, this being but of office, it may be supplied by a writ of inquiry, as the four points in a *quare impedit*, (*viz.*) *de plenitudine, ex cujus presentatione, si tempus semestre transierit*, and the value of the church *per annum*: and in the case at barr by the rule of the court a new *venire facias* was awarded.

The Case of the Maior and Burgesses of Lynn Regis, touching misnaming of corporations, 11 Jac. fo. 122. com. banco.

H. 8. in the 29 year of his reign, did incorporate that town by the name of *Maioris & Burgensium burgi domini regis de Lynn Regis*, and one made an obligation to them by the name of Maior and Burgesses of *Lynn Regis*, omitting these words *burgi regis*; this is good, because it is the same name in substance, and doth not vary in materiall words, and though it be not *idem nomen syllabis*, yet it is *re & sensu*, for burgesses that implyes it is a burrough, for burroughs and burgesses are *conjugata*, and by *Lynn Regis* it appears that it is *burgus suus* 1. *regis à fortiori*, because there is no other corporation of the

same name. *Apices juris, non sunt jura*, there may be a difference between ancient corporations, and new; for ancient corporations may by usage have severall names; and the maior and burgesses (notwithstanding *non est factum* pleaded) had judgement to recover.

William Chuns Case, 11 Jac. fo. 127. banco regis.

A LEASE for years, if the lessor should so long live, rendring rent at the four feasts, or within thirteen weeks after, after one of the feasts the lessor dyeth, and before the thirteen weeks be past, the executor brings debt against the lessee, and the defendant demurreth upon the count, and it was adjudged a good demurrer, and that the action did not lye.

1. Because the disjunctive is added for the benefit of the lessee; and the first day was but for voluntary payment, but the legall time of payment was the end of the thirteen weeks, before which when the lessor dyeth, the lessee is discharged by act of God for that quarter: if lessee before the day, pay the rent, this is voluntary and not satisfactory, but it is good to give seisin; if payment be in the morning, and the lessor dyeth at noon, this is voluntary and satisfactory against the heir, but not against the king: payment the last instant of the day is satisfactory, and after the day it is coercive and satisfactory.

2. When the first day is past, it is as if the rent had been only reserved the second day, for the election is good.

3. The rent is to be paid out of the profits of the land; *ergo*, in regard of time it shall not be apportioned; and if the lessor dye betwixt the first day and the last day, his heir, and not the executor, shall have the rent, because it was not then due; if a man lease for years rendring rent at M. or within a month after, with a condition of re-entry, and the lessee renders it at the last instant of M. the lessor shall not re-enter upon demand the last day of the moneth, because the lessee had liberty to pay it then; and the difference was taken betwixt the said disjunctive reservation, and when the reservation is at a certain feast, and a condition is added, that if it be arrear by the space of a month after the feast, that then the lessor, &c. there the lessee for salvation of his lease, cannot render it at the last instant of the feast, because he had no such liberty,

as in the other case: a lease for years rendring rent at M. or within twelve days after, upon condition to re-enter if it be arrear by the space of twelve dayes after any of the said feasts or dayes, the lessee shall have twenty four days in safe-guard of his lease after the feast of M. and in the case at barr judgement given, *quod quarens nil cap. per billam.*

James Osburnes Case, 11 Jac. fo. 130. banco regis:

IN an action upon the case, for the plaintiff had bought of the defendant diverse goods which he refused to deliver, whereof one was *unum fulchrum lecti, anglice*, a field beadstead with a testerne, and curtains of saye, the plaintiff recovers, and damages assessed intirely, where none ought to be given for the testern, &c. for *fulchrum* signifieth a bedstead only, upon errorr brought therefor judgement was affirmed, for one thing only is here put in issue, for the other things are not alleaged *positive sed expositive*, and are nugation; but when two things are put in issue, or *oblique*, inquired of by the jury, there it is not good; and it shall not be intended that damages were given for that only for which the action was brought, but in an action upon the case for words spoken at one time, whereof some are actionable, and some not, there damages may be assessed intirely, and shall be intended to be given for the words actionable only.

1. Because the plaintiff must declare as the words were.
2. Because the words not actionable aggravate the damages, otherwise if spoken at several times; but here damages shall be intended to be for that which is actionable only, and the rest, as if never alleged: and in writs or pleas English words are not admitted by 36 E. 3. cap. 15. except they be parcell of a name, as *fo.* in the *Hall.* 2. Words which passe under the name of Latine, are,
 1. Good grammaticall Latine.
 2. Words significant in law, and not in grammar.
 3. Incongruous Latine, which doth not vitiate a plea, or grant, nor judicall writ.
 4. Words insensible, having no countenance of Latine, and are rejected; but feigned words as *velnetum, stapedia, &c.* are good.

Read and Redmans Case, 10 Jac. fo. 134.

THE defendant in debt brought by two executors pleads the death of him who was summoned and severed.

Resolved, the writ shall not abate; if two purchase an originall reall action, and one dyeth pending the writ, this shall abate in all, as in case of joyn tenants, or parceners, where one dieth having issue, or no issue, because that she may have a writ for the whole, and shall not recover a moyety, and one shall not recover upon a false reall writ, or unapt for his case, in respect he may have an apt writ, although it happen after by act of God; but if two purchase a judicial writ, and one is summoned & severed, and dies without issue, the writ shall not abate; the same law where jointenants, but if the coparcener had issue, then it shall abate: if one of the plaintiffs after summons and severance marryeth, this shall not abate the writ. In personal and mixed actions, although an intire chattel be demanded, the death of one after summons and severance doth not abate the writ; as in a writ of ward of the body: in a *quare impedit* without severance, &c. If one die the writ shall not abate, because thereby the other should be disinherited, as upon penatie and six moneths passed; but without question if one of the plaintiffs in a *quare impedit* be severed and die, the writ shall not abate; where the plaintiffs are only to discharge themselves, the writ shall not abate by the death of one of the plaintiffs or defendants, and therefore there the non-sute of one is not the non-sute of the other, but otherwise it is in a writ of error: note, summons and severance is before appearance, and non-sute after appearance, where the severance is without process.

Richard Smiths Case, 10 Jac. fo. 135.

R. S. brings a *quare impedit presentare ad medietatem ecclesie*, and adjudged the writ was good; 1. None shall have such a *quare impedit*, but when there are two several patrons, and 2 incumbents of the church; therefore, if two present by turn, the *quare impedit* must be *presentare ad ecclesiam*: when the register giveth a writ for the whole, this is a good warrant to bring it of any part, if the case will warrant it; but it seemed to the chief justice that in the case at bar the writ might have been good, *presentare ad ecclesiam*, for as to him it is one church.

CASES UPON THE COMMISSIONS OF SEWERS, 7
JACOBI.

The Case of Chester Mill upon the River of Dee, fo. 137.

ADJUDGED that the statute of *magna charta omnes hidelli deponantur* extends only to open weares for taking of fish; and that commissioners of sewer cannot subvert a causey, &c. erected before the time of E. 1. but by the statutes of 25 E. 3. *cap. 4.* and 1 H. 4. *cap. 12.* if they be inhaunced, they ought to be amended by abatement of the inhauncement, and the causey in question was erected before the time of E. 1. and never since inhaunced, and therefore out of all the said statutes.

Keighleys Case, 7 Jac. com. banco, fo. 139.

IT was resolved, that if one be bound by prescription to keep a wall *contra fluxum maris*, and the wall is subverted by a sudden inundation of waters, salt or sweet, by the statute of 23 H. 8. *cap. 5.* the commissioners have power to tax all equally who have damage by such surrounding, for no default was in the party; so if the wall be in inevitable danger, but if it be through his neglect, each one may have his action upon the case against him,

and if the danger be not inevitable, he only shall be charged.

2. *Resolve.* by the said statute, the commissioners are not bound to observe the customs of *Romney Marsh*, but where such customes are in any places within their commission.

3. According to your wisdoms and discretions in the said act are to be interpreted according to law and justice, for every judge or commissioner ought to have *dum sales, salem sapientia ne sit insipidus, & salem conscientia ne sit diabolus*: and discretion is *scire per legem quid sit justum*: and every of their ordinances ought to consist upon four cause.

1. The material cause, and that is the substance.
2. The formal cause, and that is the manner.
3. The efficient cause, that is their authority.
4. The final cause, and that is for the publique good.

The Case of the Isle of Elye, 7 Jac. fo. 141.

THE commissioners of sewers decreed that a new river shall be cut out of Owse, seven miles within the main soyle of the Isle, and for the doing thereof, and for the effecting thereof, taxed diverse townes in the county of C. out of the Isle generally; that is, so much upon every town; 2 questions;

1. If the commissioners have power to make such a new river?
2. If such a general tax be lawfull?

By the common law the king ought to defend the realm as well against the sea as enemies, and to provide that the subjects may have safe passage over bridges and high-ways, and therefore if the walls of the sea, or gutters be not scoured, he ought to award a commission to inquire of such defaults as by the register amongst the commissions of *oyer and terminer*. See there a president, 44 E. 3. for reparation of ancient sewers, &c. or making them new, but the statute of 6 H. 6. cap. 5. and divers others for making new walls, &c. were only temporary, and that power is omitted in the act of 23 H. 8. ca. 5. which is made perpetual by 3 E. 6. cap. 8. and so the

commission in this point insueth the commission which was at the common law: therefore it was resolved, that the commissioners in this case could not make the said new river, because their commission extends only to the reparation and new making of ancient walls, gutters, &c. And it would be hard to give power to commissioners to try new inventions to charge the country, which may never take effect: and it appeareth by the Register, 252. that a new river ought not to be made, and the old stopped, without an *ad quod damnum*, and the kings license; yet when a new sewer is to be made, any small alteration for the publick good of such a place may be made; so of an ancient wall against the rage of the water, in case of inevitable necessity, but if by timely reparation that peril may be avoided, no other ought to be made: *si assuetis mederi possis nova non sunt tentanda*: but if new inventions appear profitable, contribution must be voluntary, and not by compulsion, and in 3 Jac. Popham, Chief Justice, preferred a bill in parliament to make a new river in the Isle, but it was rejected.

2. *Resolved*, none ought to be taxed, but he who may have damage by the default, or profit by the reformation; also the assesment must be according to the quantity of their lands, and number of acres, and according to the rate of every mans profit and portion, and the taxation in general was not warranted but it ought to have been in particular upon every owner or possessor, observing the said qualities. Some statutes of sewers are in *defendendo* & *reparando wallias*, &c. some in *destruendo* & *amovendo nocuendo*, and some touching both.

IN THE COURT OF WARDS.

Scroops Case, 10 Jac. fo. 143.

N. S. made a feoffment to diverse uses, with power of revocation by indenture, and after by another indenture, (observing all incident circumstances prescribed,) the feoffor covenanteth to stand seised to several other uses.

1. This inureth to a revocation.

2. To raise new uses: and so it was resolved in the kings bench, between *Frampton* and *Frampton*, Tr. 2 Jac. *Quia non refert an quis intentionem suam declaret verbis, an rebus ipsis vel factis*, and when he limits new uses, he signifieth his purpose to determine the uses before.

THE ELEVENTH BOOK.

The Lord de la Wares Case, 39 Eliz. in parliament, fo. 1.

THOMAS LA WARE, great grandfather of the now lord, in 3 H. 8. was summoned to the parliament by writ, and by 3 E. 6. it was enacted, that *William* the father of the now lord *Thomas* shall be disabled to claim any dignity, during his life, notwithstanding W. was called to parliament by *Q. Elizabeth*, and sat as puisne lord, and dyed, and *Thomas* now lord, sued in parliament to the *Q.* to be restored to the place of his great grandfather, that is, betwixt the Lord *Barkly*, and the Lord *Willoughby of Eresby*, and resolved, that he should be restored, for his fathers disability was not absolute by attainder, but only temporary and personal, during his life, and the acceptance of the new dignity shall not hurt the petitioner, the father being then disabled, and an esquire only, so that when the old and new dignity descend together, the old shall be preferred: which resolutions by the judges was well approved of by the lords committees, and after confirmed by the queen.

Auditor Curles Case, 7 Jac. fo. 2.

QUEEN Elizabeth grants *officium unius auditorum curiæ wardorum*, to W. T. and W. C. for life, & *eorum diutius viventi*, the K. grants it in reversion to I. C. & I. T. I. C. dyeth, the K. grants it in reversion to R. P. W. T. dyeth.

1. Resolved, the grant of the office *unius auditorum*, &c. is good to two, and the survivor of them, for 32 H. 8. c. 46. maketh the two auditors one officer, and the word *unius* is not numerative, but denoteth the unity of the office.

2. In such a grant the words & *eorum diutius viventi*, are not void, &c. for otherwise by the death of one of them the interest of both would be ended; but now the survivor remains auditor, and another shall be added to him, and till another is added to him, his voice in court is suspended,

because by the statute there must be two ; so if the K. grant by a patent to one, and by another to another, this is good, and until the second is added the first hath no voice in court.

3. The nomination of auditors ought to be under the great seal.

4. This office cannot be granted in reversion.

1. Because it is judicial, and one cannot be judge *in futuro*, and perhaps he was sufficient at the time of the grant, but not when it takes effect.

2. Although it be in part judicial, and in part ministerial, yet it is intire, and although ministerial offices may be granted *in futuro*, yet this cannot, because it is inseparably judicial also, for the K. cannot grant the judicial part to one or two, and the ministerial to others.

3. If the grant be good as to the ministerial part, yet it shall not take effect now, because one of the ancient officers is living, and if he should exercise the ministeriall part with the survivor, there would be three offices.

5. He who surviveth remains auditor, yet had no voice in court untill the king add another to him.

6. The grant to P. is void.

1. Because in reversion.

2. Because it reciteth a void grant to I. C. and I. T. as good, and so the K. is deceived of his grant.

Sir John Heydens Case, 10 Jac. fo. 5.

SIR J. H. brings trespass against F. C., T. C. & I. C. F. C. appeareth, against whom the plaintiff declareth, with *simul cum*, &c. who pleads *non culp.* so doth T. C. which issues were tried severally, and the issue between the plaintiff and F. C. was first tried and damages assessed to 200l. and the other against T. C. 50l. I. C. appears, and confesseth the action, a writ of inquiry of damages is awarded, but none issued, judgement for the plaintiff, and affirmed in error.

1. Resolved, in trespass against divers who plead *non cul.* or several pleas which are found in all for the plaintiff, damages shall not be assessed severally, although one did more wrong than another, because the trespass is intire, and the act of one is the act of all, but if they be found guilty at several times, they may, and if the plaintiff confess the trespass to be at several times, the writ shall abate.

2. If two trespassors plead severally, both shall be bound with the damages taxed by the first jury, and the other shall have an attaint although he be a stranger to the issue, because he is privy to the charge; if one of them after appearance make default, a writ of enquiry shall be awarded to save a discontinuance, but none shall issue, because he shall be contributory to the damages taxed by the jury who tryed the other issue, and the other shall not be charged in damages assessed upon a writ whereupon he can have no attaint, but if the other issue be found against the plaintiff, then it shall issue.

3. Although there was a discontinuance against I. C. because in the common place, where the action was brought, there is no continuance after a writ of inquiry, (otherwise it is in the kings bench,) yet it is aided by the statute of 32 H. 8. c. 30.

4. If two juries give a verdict at one time, the plaintiff shall have judgement, *de melioribus damnis*, if he will; but *fiat nisi unica executio*, in trespassse against diverse who plead several pleas triable by the same jury, if the jury sever the damages, all is vitious.

Priddle and Nappers Case, 10 Jac. fo. 8.

THE plaintiff in a prohibition declareth that the prior of M. was seised of 22 acres, and of a rectory time out of mind, &c. until the dissolution, &c. and so, for all that time held them discharged of tithes, and conveys the said 22 acres from the king to himself, and that the defendant *propriarius rectoriæ prædictæ*. sued the plaintiff for tithes; the defendant traverseth the prescription of discharge; the jury found that the prior, time out of, &c. was seised of the said 22 acres, and of the advowson of the rectory, and did appropriate it by license, 20 H. 8. the incumbent then being living, who dyeth, and that the prior held it united to the dissolution: judgement for the plaintiff.

1. Resolved, although that every church parochiall is supposed to be presentative, yet the plaintiff may plead that the prior, &c. time out of, &c. were rectors of it, for this amounts to so much that it was impropriated, that he needs not show how, because before the time of memory; but the conclusion of the prescription of unity, *viz. ratione cuius*, he was discharged of tithes was not good, for

land is not discharged of tithes by unity, but of payment of them, notwithstanding the mistaking of the conclusion doth not vitiate the count when the cause to have a prohibition is good.

2. The plea of the defendant to have a prohibition is not good, because he traverseth the conclusion, viz. the prescription of discharge, where he ought to traverse the prescription of unity, for the conclusion is not traversable, and because it is matter in law.

3. The issue is not well joyned.

1. The matter of discharge is by reason of discharge by the statute, and the issue is by discharge at the common law.

2. In every issue there must be an affirmative and a negative, but here is no affirmative, for the conclusion is no affirmative, but an inference.

4. The impropriation is sufficient, although the license were generall, and the incumbent living, for it shall be construed in such a speciall sence, that it may take effect, and the license is alwayes generall, for the incumbent may die, or resigne, before the impropriation.

5. Admitting the impropriation void, it had not been made good by 35 Eliz. c. 3. for this settles in the K. all possessions of abbeyes with qualification, notwithstanding any defect in any surrender, &c. which intituleth the K. and this defect is not within the qualification, but if the impropriation had been good by reputation, and so used, this had been given by the statute of 27 & 31 H. 8.

6. If the jury found matter to barr the plaintiff, this is not to be regarded, because an attaint lyeth not, nor the witnesses punished for perjury, that matter not being materiall to the issue.

7. Resolved, that perpetuall unity untill the dissolution is, by the statute, *prima facie*, a discharge of payment of tithes, except that the farmors have paid tithes, and such an unity ought to be *justa aequalis*, that is, free in one, and other, *perpetua & libera*, but if the abby were founded in time of memory, he cannot at all, and here it appeareth that the impropriation was made in 20 H. 8. so that it appeareth to the court that before that the 20 acres were charged with tithes, for of common right all lands ought to pay tithes; therefore the chief justice concluded that

the said 20 acres (as this case is) were chargeable with tithes; but in regard the information is good, and the plea *pro consultatione habenda* altogether insufficient, and the verdict impertinent to the issue, they would not grant a consultation.

Doctor Grants Case, 11 Jac. com. banco, fo. 15. in a prohibition.

1. **RESOLVED**, it is a good prescription that every inhabitant in a parish have paid 2s. in the pound, of the value of their houses, *per annum*, in lieu of tithes, because it may have a lawfull commencement, for it may be, that this was so time out of mind for the lands whereupon the houses were built, as a *modus decimandi*.

2. That the parson may sue for it in the court christian, for that it is in the name of tithes; and every antient city and burrough had for the most part such a custome for their houses, for the maintainance of their parsons, and obventions include oblations, reñts, or other revenues, and after a consultation was granted.

Sir Henry Nevils Case, 11 Jac. fo. 17.

IT was resolved, that a customary mannor may be holden of another mannor, and there may be lord, measn, and tenant of it, and such a customary lord may hold courts, and grant copies, and such a mannor shall pass by surrender and admittance, and fines shall be paid upon alienation or descent, and if it be forfeited, the lord shall have the services as annexed to the mannor; so if a tenant at will, &c. admit copy-holders reserving rent, this shall go with the mannor after the will determined; and so note a difference between reservations at the common law and by the custome of the mannor. And it was said that the mannor of *Aylesham* in *Norfolk* is holden by copy, and others in divers other places: and judgement was affirmed in error.

Doctor Ayries Case, 11 Jac. fo. 18.

14 E. 2. the K. licenced *R. de E.* to found in Oxford a hall, *sub nomine Aula Scholarium Reginae de Oxonio*, in the exemplification 8 Jac. it was *sub nomine Aulae Reginae de Oxonio*, they present to the church by the name of *praeposit. Coll. Reginae in Universitas Oxoniae & Socior. & Schollar. ejusdem*, the incumbent deviseth the rectory, and they by the name of *praeposit. Socior. & Scholar. Aulae vel Collegii Reginae in Universitate Oxonii*, confirm the demise; and notwithstanding these variances it was adjudged, that as well the confirmation as the presentation was good: and the sole doubtfull variance is, that it was *Aula Reginae*, where it ought to be *Aula Scholarium Reginae*, but good, for the true name of the college is so, for the word *Scholarium* is not necessary but once, and if it be taken in construction to come after *Aulae*, the provost will be the sole corporation, by the name of *praeposit. aule scholar. reginae*; *ergo*, it doth precede in good construction. Also, the founder named it so, and so it hath been alwaies taken, and if there be a small variance, this is not to the purpose, if it be so described that another cannot be meant, as a gift *omnibus filiis I. S. or filiae I. S.* when there is but one, or if *Richerus* Abbot of W. grant by the name of *Richardus*; *nil facit error nominis cum de corpore constat*, and this was the antient and constant opinion in case of corporations. See the case of the Maior and Burgesses of *Lin.* in the tenth book.

Henry Harpurs Case, 12 Jac. fo. 23.

IN *ejectione firmae* upon a lease to J. W. *in unam capellam*, and land in W. in the parish of B. and tithes, without shewing the certainty of them, the visne was from B. the case was, Sir H. B. seized of G. of the value of 30*l.* *per annum*, and of N. of the annual value of 18*l.* *in capite*, covenanted to stand seized to the use of him and his wife in tail, with remainders in tail, the reversion to himself, and after purchaseth lands in socage, and deviseth them to be sold by his executors, the matter in law resolved,

but no judgement given, because divers exceptions taken, &c.

1. *Resol.* that if tenant of the king *in capite* conveys his land to one of the uses, &c. and after purchase socage, he may devise all the socage.

2. A seck reversion upon an estate tail shall hinder the devise of socage land for a third part.

3. Although the reversion in fee continue in him, yet he may devise two parts of the socage, and all if he had granted the reversion over.

4. Although he had exercised his power in making a joyniture of more than two parts, yet if the reversion in fee had not hindered, he might have devised all the socage purchased after, howsoever the devise is good for two parts; for the reason reported in *Loveyes Case*.

5. Although the consideration of advancing his wife and their issues extends not to the brothers, yet the use is well raised to them, because the law implyeth a consideration, and it is not to the purpose that they are found brothers, because it appeareth in the deed.

6. For the mannor of G. the estate tail vanisheth by the death of Sir H. without the issue male, and therefore that estate is no cause to restrain the devise for any part, but the reversion in fee is for a third part: so resolved, that the plaintiff shall have judgement for two parts. Exceptions to the count and visne.

1. The *ejectione firmæ* is of tithes, without shewing the kinds of them; *ergo*, not good, for a certain judgement and execution cannot be made; 2. It may be it is in a *modus decimandi*, for which an *ejectione firmæ* lyeth not.

2. *Capella* is demanded, which ought to be demanded by the name of an house.

3. The *venire facias* is not well awarded, for it appears that there are two B. one a ville, the other a parish, and W. a ville in the parish of B. and the tithes are alleged to be in W. *in parochia de B.* so the visne must be out of B. and W. because there is the most certainty; so that by reason of these exceptions, no judgement was entered, but it was said that the courts of wards, where a bill depends for this matter, will take order for the possession accordingly.

Henry Pigots Case, 12 Jac. fo. 26.

B. W. brings debt upon obligation made to him when he was sheriff, omitting the name of his office, but it was after interlined by a stranger, the defendant pleads *non est factum*, without oyer of the deed, and judgement was given for the plaintiff.

1. When a deed is rased, the obligor may plead *non est factum*.

2. If a deed be rased by the obligee himself in a place not material, it is void; but not if done by a stranger, except in a place materiall, and here it was in a place not material, because it appeareth not to the court that he was sheriff. If a deed consist of divers parts whereof one doth not depend upon the other, and some of them are against law, the deed is good in part; but if any of them be rased, it is void in all: so if the seal of one be debrused, all is void: See *Matthewsons Case*, in the fifth book.

Alexander Powlters Case, 12 Jac. fo. 29. dictment.

A. P. *felleo animo*, burned a house in *New Market*, whereby the greatest part of that town was burned.

Resol. he shall not have his clergy, for this was felony by the common law, and so hainous, that he was not replevishable no more than for treason, as appears by *Westminst. 1. cap. 15.* but he shall have his clergy at the common law; for impediments to have clergy were, first, disability to be a member of holy church, as a blind man, or woman.

2. Heresie.

3. Infidelity, as a Saracen or Jew, but a man excommunicated, or outlawed, shall have it.

5. Confession before the statute of *articuli cleri, c. 15.* because he cannot make his purgation.

6. High treason or petit treason before 25 E. 3. cap. 15. So of sacrilege, and of *insidiatores viarum, & depopulatores agrorum*: see the statute of 4 H. 4. cap. 2, but the statute of 23 H. 8. cap. 1. taketh away clergy where one is found guilty of burning of houses, but this is to be intended by verdict or confession; but if he stand

mute, or challenge more than he ought, or be outlawed, these are out of the statute, or if he commit burglary, and not robbery, he shall have his clergy; by 25 *H. 8. cap. 3.* he who is found guilty of any of the said offences shall lose his clergy; and if he stand mute, or challenge above his number. but that extends to the principal only in case of indictment, and not to the accessary before the fact, nor to appeals or approvements, nor to outlary; but these two statutes were taken away by 1 *E. 6. cap. 12.* but 25 *H. 8.* was revived by 5 & 6 *cap. 10.*

Obj. that the said statute was not revived in all, but as to stealing of goods in one county, and flying into another, for so is the style of the act.

2. If it be revived, this takes not away clergy, where one is found guilty by verdict; but the statute of 23 *H. 8.* which is not revived. But it was resolved that the in-tire act is revived.

1. Although that the statute of 5 *E. 6.* reciteth these offences solely, and reviveth the act and clergy, touching such offences, that shall be intended such in mischief; so *Westminst. 2. cap. 5.* is expounded touching infants having advowsons, whether they be inward or not; and the style is not to the purpose, for many statutes are of greater extent than the style, as 27 *H. 8.* of uses concerning jointures; yet the preamble is of transferring uses into possession, also otherwise these words and every clause, &c. shall be surplusage, if it extend not to all the act, for there is but one clause in it which concerneth the offences in 5 & 6 *E. 6.* also it is that every article concerning clergy as to such offences shall be revived, and there is but one which concerns these offences, and many times penal statutes are taken by equity, as 8 *H. 6. cap. 12.* ordaineth that the imbezeling or withdrawing a record, whereby a judgement may be reversed, shall be felony, and by equity, making of a bad judgement good is felony, so 25 *E. 3.* for killing of a master extends to the mistress.

2. 25 *H. 8.* takes away clergy, where one is found guilty by verdict; because it takes away if he stand mute, or challenge, &c. in like manner as if he were guilty after the laws of the land which are affirmative words: and 4 & 5 *Phil. & Mary, cap. 4.* takes away clergy from the accessary before, which they would not have done if they had not thought that it was taken away from the principal by the other act. By 18 *Eliz. cap. 7.* clergy is taken away in

case of burglary, where he is found guilty by verdict, confession, or outlary; but if he be indicted at the common law, and stand mute, or challenge over, &c. he shall have it, and not if he be indicted by 23 H. 8. or 5 E. 6. of burglary, and put them who were in the house in fear with robbery, or upon 1 E. 6. without robbery: 4 & 5 Phil. & Mary takes away clergy where one is accessory before to a robbery in a dwelling house; *ergo*, before that such an accessory shall have it: breaking of an house in the night without robbery is no burglary, and if he doth rob he shall have his clergy, if none were put in fear, or that any of the family (and not a stranger, be not in another part of the house; but this was before 39 Eliz. cap. 15. whereby clergy is taken away without putting any fear if he rob any man of above the value of five shillings.

Accessory before in robbing a house in the day is ousted of clergy by 4 & 5 Phil. & Mary. Accessory in robbing a booth in the night or day, or out-house upon 39 Eliz. shall have his clergy: *Nota*, although a statute takes away clergy from the principal, yet the accessory before or after shall have it; and where by statute or any offence a man is ousted of his clergy, the indictment must contain the offence, with the circumstances in the statute: *Dyer*, 99. and 183. And A. P. was ordered to be hanged in chains, &c.

Metcalfs Case, 12 Jac. fo. 38. in accompt.

JUDGMENT is given against M. *quod computet & ideo in misericordia quia prius non computavit*, and before final judgement error is brought.

1. *Resol.* it lyeth not: 1. Because the writ of error saith, *si iudicium inde redditum sit*, which shall be intended of the principal judgement, as the feast of St. M. shall be intended the principal feast, and the feme shall be received upon default of her baron after judgement of admeasurement before the principal judgement.

2. It shall be intended an entire judgment, therefore in action against two, if one plead to the issue, and the other confesseth, and judgment given against him, he shall not have error before the plea determined against the other, for otherwise there would be a failer of right: for the kings bench cannot proceed upon the record, nor the common place, because it is removed.

3. The first judgement is not *ad grave damnum*, for by that he loseth nothing, but judgment of the arrerages and damage is in the end of the original.

4. This is not properly a judgement, but an award of the court, as ouster of aid, *in partitione facienda an awarde quod partitio fiat*, &c. which are but interlocutory, and not definitive.

5. They have day by the roll until the last judgement ; but if a felon die after the exigent awarded, and before attainder, a writ of error lyeth for necessity, for otherwise the goods are forfeited by awarding of the exigent without remedy ; if divers are sued by several *pracipes*, and judgement given against one, he shall have error before judgement given against the other, and if error be in the original, the tenor only shall be certified, for otherwise the court cannot proceed against the others.

2. It was resolved that the record is not removed, because untill finall judgement be given, the chief justice of the common place hath no authority to send it, and they may proceed, notwithstanding the roll be marked *mittitur*,

Richard Godfreys Case, 12 Jac. fo. 42.

TWELVE chief pledges according to the custome of the mannor, to represent to the leet that every one of themselves ought to pay for themselves 10s. *pro certo leta*, the steward imposeth a fine of 6*l.* upon them, the lord distreineth for the fine and certainty of leet, one of the pledges brings replevin, and judgement was given for the plaintiff.

1. *Resol.* the fine is not well assessed, for it ought to be several, and not joint as it is, because the offence is several, and although that the offence be joint, yet the fine shall be several, as in disseisin and trespassse. But for the incertainty of the persons, and infinitenesse of the number, many may be fined together, as the town for the escape of a felon ; and the reasonableness and excessivenessse of the fine shall be determined of the judges : *excessus in re qualibet jure reprobatur communi*, as excessive distress, excessive aid, and excessive amerciamment, are against the common law.

2. If the fine be imposed erroneously, it may be avoided by plea, for he had no other remedy.

3. The lord cannot destrein, *pro certo leta* without prescription, because it is against common right, but he may for a fine or amerciament; but for an amerciament in a court baron, the lord must prescribe; a fine because it is assessed by the court, needs not to be affixed, but an amerciament must be affixed by the country.

4. Admitting that he may distrein *pro certo leta*, he shall have a return, although he had no cause to distrein for the fine, for where one brings an action for two things, and it will not lie for one of them, it shall abate only for that if he cannot have a better action for it, but if he may it shall abate for the whole; as in a *formadon* of land, and of an advowson, the writ shall stand for the land; so if a man avow for divers rents arrear, and it appeareth that parcel is not yet due, yet the avowry is good for the residue; but if a man bring a writ of entry in nature of an assize of two acres, where it appeareth that for one acre he ought to have a writ of entry in the *per*, there all shall abate, for this extends not to the action, but to the writ only.

Richard Lifords Case, 12 Jac. fo. 46.

IN trespass the defendant pleads that J. L. was seized in fee, and demised to T. S. and M. P. (excepting trees above 21 years growth, if not decayed) for their lives, and covenanted to stand seized *de tenementis predictis cum pertinentiis superius dimissis*, to the use of R. L. in tail, &c. and the defendant, as servant to the said R. L. entered and sold trees; and judgement was given against the plaintiff.

1. *Resol.* that the trees notwithstanding the exception, remain parcel of the inheritance, and are not chattels, but shall descend to the heir, for the law doth not favour severance of the trees from the land, therefore if one bargain and sell land, upon which there are trees, they shall not passe without inrollment.

1. If there had not been such an exception, the general interest of them is in the lessor; and the lessee had but a particular interest in them, and the lessor may sell them without license of the lessee, to take effect after the lease determined, and tithes shall not be paid for them because they are parcel of the inheritance; 2. By the exception of

them, the soil is not excepted, but only so much as sustaineth the tree, and if he by licence of the lessee root them up, the lessee shall have the soil; but by exception of wood, the land it self is excepted; if an acre, or an advowson be severed from the mannor by exception upon a lease for life, it shall not be parcel of the mannor again; otherwise of trees, for they were not severed *in facto*, because they grow out of the land.

3. A thing in possession cannot be parcel of a reversion upon an estate for life, but trees which grow out of the land, and fish or deer in the land may, and shall pass with it.

4. In this case by grant of the reversion generally, or of the tenements, the trees pass, for the inheritance of all the land passeth, and thereby the trees annexed to it; the disseisee by his entry shall have the corn upon the ground, as well as the grasse, by relation of continuance of possession, but this relation is not of effect to have a trespass against any but the first disseisor; for *in fictione juris semper equitas existit*, and the emblements shall be recovered in damages.

5. In the case at bar by exception of the trees power is reserved to the lessor or his servants, to enter and shew the trees to the vendee: *cuicunque aliquis quid concedit, concedere videtur & id, &c.*

6. The plea in bar is insufficient, for he sheweth that there was another jointenant for life not named in the writ, and demands judgement if action which is an apt conclusion.

2. The plea is double, one to the writ, another to the action.

3. He pleads the entry of the lessee for life, which is surplusage.

4. He averreth not that the trees which were sold were not dotards which are excluded out of the exception, but that they, *de jure pertinebant* to R. L. which is not formal: but upon all the matter here appeared sufficient cause to give judgement against the plaintiff, and therefore by the rule of the court, *quarens nil capiat per billam*.

*The Case of the Taylors of Cloaths, &c. of Ipswich, 12
Jac. fo. 53.*

THE taylors of I. make an ordinance that none shall exercise the trade in I. if he hath not been an apprentice for seven years, and if he do not appear before them to be approved, upon forfeiture of five marks, and for breach of it bring debt; the defendant pleads that he was retained by A. P. to be a domestic servant, and that he made garments by his command.

1. *Resol.* at the common law none may be prohibited to exercise any trade, although he hath never been an apprentice, and be ignorant; but if he misdoe any thing, an action of the case lyeth.

2. This ordinance for so much as is not prohibited by the statute of 5 *Eliz.* is against law, for after seven years apprenticeship he may exercise his trade without allowance of any.

3: The statute of 5 *Eliz.* doth not prohibite the private exercise of any trade in a family; therefore this is out of the said ordinance.

4. The statute of 19 *H. 7. cap. 7.* doth not corroborate any ordinance against law, if it be allowed, but the allowance dischargeth the penalty of 40*l.* for putting in use any ordinances which are against the prerogative of the king, or the common profit of the people; and judgement was given, *quod querentes nil ceperent per billam.*

Edward Savells Case, 12 Jac. fo. 55.

AN *ejectione firmæ* lyeth not of a close, but it must be of a certain number of acres, and the nature of them must be shewed. A writ shall not abate for want of order, *viz.* of a house before land, &c. and judgement was stayed.

Benthams Case, 12 Jac. fo. 56.

IF damages or costs are omitted, or not well assessed by the jury, if the plaintiff release them, he may have his judgement, and it shall not for that be reversed: insufficient assesment of damages, and no assessing is all one.

Doctor Fosters Case, concerning recusants, 12 Jac. fo. 56.

AN information was preferred against a recusant, by an informer, *tam pro domino rege quam pro seipso*, before the recusant was convicted for 220*l.* that is 20*l.* a month for a 11 months absence from the church, &c. and judgement given against the defendant.

1. Resolved, that he may be convicted, (to satisfie the statute of 23 *Eliz.* in this same sute, and convicted shall be taken for attainted,) for he shall forfeit nothing before judgement.

2. The branch of distribution in the act of 23 *Eliz.* extendeth as well to the clause of penalty for recusancy, as to that of hearing or saying masses, for it is all one to say, shall forfeit, and shall forfeit to the king.

2. Divers acts of parliament give the penalty to the king, and yet after make a contribution thereof to another who will sue, as 3 *H. 6. cap. 3.* & 3 *H. 7. 3.*

3. He against whom judgment is given, upon demurrer or default, or otherwise, is convicted within the statute, for he is attainted, which implyeth it, for it is so found by the judges: so by the statute of 8 *H. 6.* treble damages are given where a disseisin is found to be with force; this extends to judgement by *nihil dicit* or default.

4. The statute 28 *Eliz.* doth not take away the statute of 23. which giveth liberty to the informer, &c. for,

1. It is made for more speedy execution of it.

2. It doth not alter the sute of the party, but of the king, and leaveth the informer as he was before.

3. The act of 28 giveth not the penalty to any new person, for it was given to the K. by 23 *El.*

4. The statute of 28 extends only to indictments, and toucheth not informations.

5. The defendant is not within 28 *Eliz.* if he be not convicted at the sute of the K.; *ergo*, this is left as before.

6. Because the statute is in the affirmative, and they may stand together, but the statute of 28 alters the statute of 23 in this, that it confineth sutes against recusants in the K. bench, or assizes, &c. which clause extends as well to the sute of the informer as of the queen, and the statute of 25 *Eliz.* & 3 *Jac.* enlarge the jurisdiction, as to the sutes of the K. and touch not the sute of the party.

5. The statute of 35 taketh not away the action popular given by 23. for it was made to give more speedy remedy, and not to take it away, a feme covert is within the statute of 23 and 1 *Eliz.* but before the statute 35 *Eliz.* if a feme covert had been indicted of recusancy, the forfeiture should not have been levied of the goods of the husband, because he was not party thereunto; otherwise in an information or debt brought by the informer: and in that, that the statute of 35 is, that the K. shall recover all the pains, &c. in such sort, &c. this alters the remedy only as to the queen, for now she may proceed by action, as for recovery of any other debt by the common law, in such manner as 1 *H. 7. c. 1.* giveth a formedon, against a parnor of the profits, &c. also 35 *Eliz.* is in the affirmative, and although it giveth the penalty of 20*l.* by the month, yet it taketh not away 1 *Eliz.* which giveth 12*d.* for every sunday and holy-day, and where this statute saith, that the conviction shall be in the K. B. or at the assizes, yet the justices of peace and others authorized by 23 may take indictments: the statute of 3 *Jac.* inflicteth imprisonment upon the feme covert, yet it taketh not away the forfeiture before: where a new person is designed by a new statute, this taketh away the antient statute if they cannot stand together, and although there are exclusive words concerning courts, yet the court of K. bench is not excluded, because it is *coram rege*.

6. A recusant may plead *auterfoits convict*, or other collateral bar, as pardon, submission, &c. out of the indictment; for 3 *Jac. c. 4.* extends only to defects within the indictment or other proceedings, & the informer cannot charge any who is convicted before at the sute of the

queen, upon 23 or 35 *Eliz.* or 3 *Jac.* and upon 23 the informer must sue within a year and a day.

Nota, if after a popular act commenced the K. attorney will not prosecute, the informer may for his part, and condemnation or acquittal at his sute, is a bar against the K. and all others, yet the K. may pardon it before an action commenced, and if the informer dye, the attorney may prosecute the sute, and the information shall serve for the king.

The Case of the Masters and Fellows of Magdalen College, in Cambridge, 13 Jac. fo. 66.

DOCTOR K. Master of M. College, and the fellows, 17 *Eliz.* grant to the queen, reserving rent, upon condition to grant over, which is done accordingly, the jury find 13 *Eliz.* of deans and chapters, and 13 *Eliz.* of confirmations, a fine with proclamations is levied, and five years pass: Doctor K. dieth, the successor accepts the rent, and within five years after his election enters, and he and the fellows demise to the defendant. And judgement given for the defendant.

1. Resolved, the master and fellows are restrained by the statute of 13 *Eliz.* to grant to the queen, for the Q. is a person within the letter of the statute, and if he should be exempted, this should be by construction of law, which cannot be.

1. Because a general statute for maintenance of religion and good literature, or relief of the poor, binds the K. although he be not named; and it appeareth by the statute of 1 *Eliz.* that the K. is included within the words person or persons, for there he is exempted.

2. Because the statute is made to suppress a tort, therefore the statute of *donis* binds him.

3. A statute made to perform the intent of the donor binds the K. without being named, as the statute of *donis*.

4. The master and fellows are disabled to grant, therefore the K. cannot purchase of them.

5. The intent is to be observed, which was to convey by the queen to a subject, and so to make her an instrument of wrong, as one who holdeth of the bishop grants to the queen to regrant to a corporation by covin, to take away the seignory of the bishop by extinguishment, and to

make an evasion out of the statute of *mortmain*, this patent shall be repealed *jure regio*, so here : and this act extends to a corporation not incorporate by such names as are in the statute.

2. The statute of 18 *Eliz. c. 2.* doth not confirm this grant, for it is out of the words of the statutes, because it it not made upon consideration, and here the reversion of the rent is not considered, because the queen was to grant it before the rent be due ; 2 grants to the K. may be void or voidable.

1. In respect of the grantor, as if an infant grant unto him.

2. In respect of the thing granted, as if a foundership be granted.

3. In respect of the estate, as tail.

4. In respect of the grant, if it agree not with the rules of law.

5. In respect of omission of any circumstance, as inrolment, this statute aideth not grants of the first sort, for it doth not inable persons disabled by the law to grant, as here, nor of the second sort, but confirmeth grants of tenant in tail, because he was able to grant, but aids not grants of the fourth sort : for *quæ mala sunt inchoata principio vix est*, &c. but it aideth grants of the fifth sort.

3. At the time of the said statute this grant needed no confirmation, because Doctor K. the master was living.

3. The fine and non-claim doth not bar them ; 1. Because although it was not a conveyance made by them, yet it was suffered by them within the words of the statute.

2. Doctor K. nor any in his time cannot make his claim, and claim was made within five years after his death.

4. Acceptance of the rent doth not bar them because it is a body aggregate of many, and acceptance by the master sole doth not bar all, and the rather being without deed : and judgement given, *quod querens nil caperet per billam.*

Lewis Bowles Case, 18 Jac. fo. 79. in trover and conversion.

T. B. covenants to stand seised to the use of himself and his wife for life, without impeachment of waste, the remainder to the first, second, and third son, successively in tail, the remainder to the heirs of their two bodies, the remainder over, they have issue I. T. B. dies, the issue dies, the wind bloweth down a barn, parcel of, &c. and the timber in the count mentioned was parcel of that barn, the feme carrieth the timber out of the mannor, he in remainder assigns by fine to the plaintiff, the feme dyeth, the plaintiff brings an action of trover and conversion against the executors of the feme; and judgement given against the plaintiff.

1. Resolved, untill the birth of the issue, T. B. and his wife have an estate tail executed, but after this it is divided, and they have for life, the remainder to the issue in tail.

2. Tenant in tail after possibility had a greater estate as to the quality than tenant for life: therefore,

1. He shall not be punished for waste.

2. He shall not be compelled to attorn.

3. He shall not have aide.

4. Upon his alienation a *consimili casu* lyeth not.

5. After his death intrusion lyeth not.

6. He may joyn the mise upon the mere right.

7. He shall not be named in an action for or against him, tenant for life, but not as to the quantity, therefore his feoffment is a forfeiture, rescuit lyeth upon his default and exchange by him, and tenant for life is good.

3. The feme is not tenant in tail after possibility, &c. for this must be a remainder of an estate tail by act of God, and not by limitation of the party: and though she be tenant in tail after possibility of the remainder, this doth not extinguish the estate for life, because it is not a greater estate.

4. She shall have the privileges of tenant in tail after possibility for the inheritance which was in her, and because she is tenant in tail after possibility of the remainder, although she cannot claim it in possession.

5. If tenant for life or years cut trees, or prostrate houses, the lessor shall have the trees and tymber, for the lessee had them only as things annexed to the land, and he shall not have a greater interest by his tortious severance, but he shall have a speciall interest in the tymber blown down, to build again withall.

6. The law giveth many privileges to a mansion house.

7. The lessee without impeachment of waste shall have trees which he cuts, for without impeachment of waste, is as much as without demand for waste done; otherwise it is, if it be without impeachment, &c. by writ of waste.

8. The privilege of without impeachment of waste is annexed to the estate, therefore if he accept a confirmation of a greater estate, or assign over, it is gone.

9. If trees are blown down with the wind, the lessee without impeachment of waste shall have them; therefore judgement given, *quod querens nil caperet per billam*.

The Case of Monopolies, 44 Eliz. fo. 84.

THE queen grants to one of the privy chamber the sole making and importation of cards, this grant is void.

1. The grant of making of cards is void; for,

1. All trades are for the publick good, for the exercise of youth in labour, and therefore it cannot be appropriated to one solely.

2. A monopoly had three incidents against the weal publick.

1. Raising of the price.

2. The commodity is not so well made.

3. The impoverishing of poor artificers.

3. The Q. is deceived in her grant, because she thought it to be for the publick good: it prohibits them who have skill to make cards, and giveth license to one of the privy chamber, who had not skil, and the K. cannot suppress card-playing, because it is not *malum in se*, and no trade may be prohibited but by parliament.

2. The license of importation of cards is void, being without limitation or stint, for the Q. may dispence with the statute 3 E. 4. c. 4. which doth prohibit it, but that ought to be with limitation.

Nota, the K. that now is, in a book printed, 1610 hath published that monopolies are against law, and command-

ed no suter to presume to move him for the granting of them : but admitting the grant good in the case at bar, the plaintiffs sole remedy had been that which 3 E. 4. in such case giveth, and that ought to be pursued; and judgement entered, *quod querens nil caperet per billam*.

The Earl of Devonshires Case, 4 Jac. fo. 89.

THE K. reciting that decayed munition belongs to the master of the ordinance, grants it unto him, who sells it, and dyeth, his executors are chargeable to the K.

1. Resolved this cannot be claimed as fees of the office, because it was erected but in 35 H. 8.

2. The grant is void, because it was upon a suggestion, that it was due to him.

3. Although the testator claims them to his own use, yet he shall be accountable to the K. for the law will make a privity, as if any man taketh the K. goods, he shall be charged in an accompt, for the K. is not bound to charge any man as receiver but generally, and otherwise the king may lose them by his death, and although the kings goods came not to the hands of the testator, yet he shall be charged if he were a means of the kings damage and prejudice.

In Sir W. M. Case it was resolved, that no officer of the K. can dispose of any part of the K. treasure, for the profit and honour of the K. without warrant under the great or privy seal, and after the executors satisfied the K. for the said munition.

*James Baggs Case, 13 Jac. banco regis, fo. 93.
in restitution.*

1. RESOLVED, that to the kings bench authority belongs not only to correct errors in judicial proceedings, but other errors and misdemeanors extrajudicial, tending to the breach of the peace, or oppression of the subject.

2. Causes of disfranchisement of a citizen ought to be acts against his duty and oath, but words against a chief magistrate art not, but may be of the good behaviour, and so of an attempt without an act done.

3. A citizen cannot be disfranchised without charter

or prescription, if he be not convicted by due course of law, as if he be attainted of forgery, perjury, or conspiracy at the K. sute, or of any other crime whereby he becommeth infamous.

4. If a citizen is disfranchised, and hath a writ of restitution, and they return sufficient cause, which is false, a writ to restore him shall not be awarded but he may have a special action upon the case.

5. Such a return ought to be certain, because the party cannot have an answer unto it, and after the court awarded a writ to restore the said I. B. and so he was accordingly.

THE TWELFTH BOOK.

Ford & Sheldon's Case, 4 Jac. in the exchequer chamber, fo. 1.

FORD a recusant, lent divers sums of money to *Sheldon* before and after the statute 23 *Eliz.* and for assurance took a grant of a rent charge by deed indented with condition of redemption and a recognisance conditioned for performance of covenants in the said indenture, in the names of the other defendants, but to his own use. *Ford* afterwards lent other sums of money to *Sheldon*, and for assurance took a rent charge, &c. as above. All the recognisances were forfeited: and afterwards in 41 *Eliz.* *Ford* was convicted of recusancy, and did not pay 20*l.* *per mensem* according to the statute 29 *Eliz.* The question was, if the king should have the benefit of these recognisances.

1. It was resolved that the recognisances would have been given to the king, had they been acknowledged to *Ford* himself, for personal actions are included in the word *goods*, in an act of parliament as well as goods in possession.

2. Although these recognisances were acknowledged to perform covenants in an indenture concerning a rent charge, and therefore savour of the realty, yet they were originally for the loan and forbearance of money, and were made for security of payment: also when the recognisances are forfeited they are but chattels personal.

3. It shall be presumed in law, that the recognisances were taken in other men's names to defeat the king of his forfeiture; and the king shall not be barred *per obliquum*, of that which would belong to him if the act were done *de directo*.

4. *Non refert* whether the duty accrue to the king by common law or by statute. And although one of the recognisances was taken before the statute 29 *Eliz.* yet it was to *Ford's* use, and it is not material that he was not convicted until the 41 *Eliz.* for at all times before that, he was subject to a forfeiture for his recusancy.

*Lord St. John versus Dean, &c. of Gloucester, 4 Jac.
fo. 3.*

THE plaintiff brought a *quare impedit* in the common pleas; which suit was stayed by aid prayer, and the record was removed into chancery; upon which the plaintiff moved for a *procedendo* and shewed divers matters to prove his title, but because the defendant and those from whom he claims, time out of mind, had had possession of the parsonage as impropriate, (saving interruption for some small time,) and for the danger of the precedent, it was resolved by the court of chancery that no *procedendo in loquela* should be granted.

*Thomas Crimes & al. plaintiffs, & Henry Smith defendant,
30 Eliz. in the exchequer chamber, fo. 4.*

RESOLVED, that where a vicarage hath continued for a great length of time, it shall be presumed that it was lawfully endowed.

Beedle & Beard's Case, 4 Jac. fo. 4.

RESOLVED, that where the impropriation of a rectory was, by any thing which can now be shown, originally defective, yet by reason of the ancient and continual possession (from 31 *Ed.* 1.) it shall not be drawn in question.

Case of forfeiture by treason, 4 Jac. fo. 6.

TENANT in tail before the statute of 27 H. 8. made a feoffment in fee to the use of himself and his wife in tail: and after the statute 27 H. 8. was made the husband was attainted of high treason and died; the wife continued in possession and died, their issue enter and die, and it descends to his issue. The question was, whether the issue in tail or the king shall have the land.

It was objected that the right of the ancient estate tail cannot be forfeited, because, 1. The ancient estate was

discontinued, and such right of action cannot be forfeited; 2. The feoffor had no right to the ancient estate tail, (for by his feoffment his right was utterly gone,) and he cannot forfeit what he hath not: and the issue in tail is remitted to the ancient right which cannot be forfeited. And the new estate tail which may be forfeited by the 26 H. 8. *cap.* 13. is by the descent and remitter avoided. But resolved that in this case, the issue in tail was barred. For although right of action is not given to the king by the 26 H. 8. yet when tenant in tail discontinues his estate to the use of himself in tail, and afterwards is attainted, he now, by the 26 H. 8., forfeits not only the new estate in tail, but the right of the ancient estate is barred forever.

Case at a committee concerning bishops, 4 Jac. fo. 7.

BY the statute 1 Ed. 6. *cap.* 2. bishopricks were made donative, but that statute is repealed by the 1 El. *cap.* 1. and the statute 25 H. 8. *cap.* 20. is revived. By the 25 H. 8. it is provided that at every avoidance the king may grant his license to the prior and convent, the dean and chapter, &c. to proceed to an election of an archbishop or bishop, with a letter missive containing the name of the person whom they shall elect.

The Case of the Stannaries, 4 Jac. in the star-chamber, fo. 9.

RESOLVED, that the king has not the pre-emption of tin in Cornwall by any prerogative, for base mines do not belong to the king by his prerogative, but to the owner of the land. But the pre-emption of tin in Cornwall belongs to the king as an ancient rent and inheritance due to him, as well of tin in the land of the subject as in his proper demesnes.

*The Case of the King's Prerogative in Saltpetre, 4 Jac.
fo. 12.*

THE king has the purveyance of saltpetre for the making of gunpowder for the defence of the realm, and may take it in the land of the subject, but the ministers of the king, who dig for it, must leave the inheritance of the subject in as good plight as they found it.

George Leak's Case, 4 Jac. fo. 15.

GEORGE LEAK joined two blank parchments with mouth glue, so close together that they appeared to be but one, and put one label through them both; upon the uppermost parchment he wrote a patent and got the great seal put to the label; he then took off the parchment, which was written upon, from the label, which, with the great seal, still hung to the blank parchment, on which he wrote another patent and published it as a good patent: hereupon two questions were moved.

1. Whether this offence be high treason or no?
2. If it be high treason, whether he may be indicted generally for counterfeiting the great seal, or must the special fact be expressed? As to the first point the justices were divided in opinion: myself and divers others held that it was neither high nor petit treason, as it is not within either of the branches of the 25 Ed. 3. But the chief justice and divers others were against us; and by reason of the diversity of opinions *respectuatur*. As to the second point, it was resolved, that if the special matter had amounted to counterfeiting the great seal, he might have been generally indicted for high treason for counterfeiting the great seal.

A Case of Custom, 24 Eliz. in the exchequer, fo. 17.

SALT was brought by sea to a haven in *England*, and part was sold and discharged into another ship and transported, but never actually put on shore: and now the doubt was upon the words of the statute 1 *El. cap. 11.* concerning exportation, viz. sent from the wharf, &c. and concerning importation, take up, discharge and lay on land: if in this case, the said salt ought to pay custom as well inwards as outwards. And it was resolved that in both cases custom ought to be paid; for the discharge out of the ship, upon the sale aforesaid, amounts, in law, to putting it upon land, for in law it is *infra corpus comitatus*.

Case of non obstante or dispensing power, fo. 18.

NOTE. No act of parliament can bind the king, in any prerogative which is sole and inseparable to his person, as his prerogative to pardon, &c. but that he may dispense with it by a *non obstante*,

*Q. If High Commissioners have power to imprison,
4 Jac. fo. 19.*

BY the 1 *El. cap. 1.* the power of the commissioners appointed by the king by force of this statute, only extends to such offences as may lawfully be reformed by the ecclesiastical law, but no power is given to imprison or impose corporal punishment.

Of stealing Women, fo. 20.

THE taking a woman against her will is not felony by the statute 3 H. 7. cap. 12. without marriage or carnal copulation.

Note: by the express purview of the act, the accessory both before and after is made principal; but by a construction of the common law, they that receive the misdoers and not the women, are accessories; for this act makes even the receivers of the women principals.

Aurum Regina, Quid? &c. 4 Jac. fo. 21.

IT was resolved by the chief baron and myself, that the queen is entitled to one mark of gold, for every hundred marks of silver which a subject voluntary binds himself to pay to the king.

Case of Forests, 5 Jac. fo. 22.

IT was resolved by all the justices that if land is a forest, it will appear by matter of record, as by eyres of justices, &c. But its being called a forest in grants, offices, and conveyances is no proof that it is a forest in law; 2. He who hath freehold in a chase, may cut his timber and wood upon it, but must leave sufficient for covert; 3. By prescription he may have common for his sheep, and warren for his conies; 4. He may build a convenient lodge within his warren for preservation of game.

Floyd and Barker, 5 Jac. fo. 23. in the star-chamber.

IT was resolved, 1. That when a grand inquest indicts a party of murder or felony, and he is afterwards acquitted, conspiracy does not lie for him against the indictors, for any conspiracy or practice before the indictment, but it is otherwise of a witness: and the law presumes that every juror will be indifferent, when he is sworn, nor will the law admit proof against this presumption.

2. When the party indicted is convicted of felony he shall not have a writ of conspiracy; but when upon his arraignment he is *legitimo modo acquietatus*.

3. If the party indicted be convicted, neither the judge, witnesses or any other person can be charged with a conspiracy. And although the party be acquitted, yet the judge or justice of the peace, being judge by commission and of record, cannot be charged for conspiracy for that which he did openly in court as judge.

Of Oaths before an Ecclesiastical Judge, ex officio, fo. 26.

NOTE, 4 Jac. The lords of the council demanded of Popham, Chief Justice, and myself, in what cases the ordinary may examine *ex officio* upon oath. Upon consideration we answered, 1. That no man can be constrained to swear generally to answer such interrogatories as shall be administered to him; but the articles shall be delivered to him, that he may know whether, by law, he ought to answer them.

2. No man shall be examined upon his secret thoughts and opinions: no layman may be examined *ex officio* except in testamentary and matrimonial causes. In cases which concern the shame and infancy of the party, he ought not to be examined upon oath.

Of Pardons, 5 Jac. fo. 29.

NOTA, although in actions popular, the king shall have the suit solely in his own name, yet by his pardon he cannot discharge the offender, because it is not only in prejudice of the king but in damage of the subjects. If a man ought to repair a bridge, and for default of reparation it fall into decay, the suit ought to be in the name of the king, but is for the benefit of all his subjects, and if the king pardon it, yet the offence remains, and the offender ought, notwithstanding the pardon, to make and repair the bridge; but the pardon shall discharge the fine for the time past: but for the time after the pardon, without question, the offender for his default shall be fined and imprisoned.

Commissions of Inquiry, 5 Jac. fo. 31.

NOTE. Commissions in *English* under the great seal were directed to divers commissioners within the counties of *Bedford, Bucks, &c.* to inquire of divers articles annexed to them; and the articles were also in *English* to inquire of depopulating of houses, converting of arable land into pasture, &c. But the commissioners should not have any power to hear and determine the said offences but only to inquire of them. It was resolved by the two chief justices, and others of the justices, that the said commissions were against law: because,

1. That they were in *English*.
2. That the offences inquirable were not certain within the commission itself, but in a schedule annexed to it.
3. That it was only to inquire, which is against law; for by this a man may be unjustly accused by perjury, and have no remedy.
4. That it is not within the statute of 5 *Eliz. &c.* Also the party may be defamed, and shall not have any traverse to it.

Customs, Subsidies and Impositions, fo. 33.

NOTE. Upon conference between *Popham*, Chief Justice, and myself, upon a judgment given lately in the exchequer, it appeared to us, that the king cannot at his pleasure put any imposition upon merchandise to be imported into this kingdom or exported, unless it be for the advancement of trade and traffic. As if in foreign parts any imposition is put on the merchandise of our merchants *non pro bono publico*, and to make equality for the purpose of advancing trade and traffic, the king may put an imposition upon their merchandise.

And it was clearly resolved by us, that such impositions so put, cannot be demised or granted to any subject. And although the king may prohibit any person in some cases with some commodities, to pass out of the realm, yet this cannot be where the end is private. It appeared unto us also, that at the common law no custom was paid but only for wool, woolfells and leather, which is called in *magna charta, recta consuetudo*. At the beginning of the reigns of kings, it hath for a long time been used by authority and consent of parliament, to grant to the king certain subsidies of tonnage and poundage, for term of life; and such subsidy might be granted by the king so long as he lived.

Doctor Edwards versus Doctor Wooton, fo. 35.

IN the star-chamber. The case was, "that Doctor *Wooton* wrote to *Edwards* an infamous, malicious, scandalous, obscene letter, to which he subscribed his name; and this he sealed and directed to his loving friend Mr. *Edward Speed*: and after the said doctor published and dispersed to others a great number of copies of the said letter."

And it was resolved, *per totam curiam*, that this was a subtle and dangerous libel: inasmuch as for the writing a private letter without any other publication, the party to whom it is directed cannot have an action on the case. It was resolved that the said infamous letter which in law is a libel, should be punished, (although it were solely

written to the plaintiff without any other publication) in the star-chamber, for it is a great motive to revenge, and tends to the breaking of the peace; and for that reason it was necessary that it should be punished either by indictment or in the star-chamber. But the dispersing copies of it, or the publication of the effect of it, aggravates the offence, and makes it a new offence, for which the party may have an action on the case.

Wootton versus Edwin, fo. 36.

RENT was reserved on a demise, to the lessor *et assignatis suis*; and the sole point in this case was, if the rent reserved shall go to the heir, or shall be determined by the death of the lessor, for if the lessor had reserved the rent to himself only, it should determine by his death; and the addition of these words, "and his assignees," shall not enlarge the reservation, for if the lessor had assigned the reversion over, yet the assignees cannot have the rent longer than the lessor himself, who hath it but for term of his own life. In *Richmond & Butcher*, a rent was reserved on a demise to the lessor, *executoribus & assignatis suis*; and it was adjudged that the heir should not have the rent, because the reservation was not made to him.

Corone. Buggary, 5 Jac. fo. 36.

BY the stat. 25 H. 8. cap. 6. if any person shall commit the detestable sin of buggary with mankind or beast, &c. it is felony; which act being repealed by the statute 1 Mar. is revived and made perpetual by 5 Eliz. cap. 7. and he shall lose his clergy.

Note, sodomy is with mankind, and it is felony by the statute of 25 H. 8. To make that offence, *oportet rem penetrare, & semen naturæ emittere & effundere*, for the indictment is *contra ordinationem creatoris & naturæ ordinem rem habuit veneream dictumque puerum carnaliter cognovit*. Every of which (*rem habuit & carnaliter cognovit*) imply penetration and emission, and so it was held in the case of *Stafford*, who was attaint in the king's bench and executed.

Premunire, fo. 37.

IT was resolved by divers justices that the statute 37 Ed. 3. 16 R. 2. &c. *de premunire* are yet in force; and all such proceedings before any ecclesiastical judges, who were in danger of *premunire* before the act 10 Eliz. c. 1. (by which all spiritual and ecclesiastical power is annexed to the crown, and the law, by which they determine causes which belong to their cognisance is the ecclesiastical law of the king) are now in case of *premunire* after the said act; be it before the high commissioners or other ecclesiastical judges. The 1 Eliz. repealed the 1 and 2 P. & M. with an express proviso that it shall not extend to the repeal of any thing in the 1 and 2 P. & M. which toucheth or concerneth any matter or cause of *premunire*.

Nicholas Fuller's Case, fo. 41.

THESE points were resolved by all the justices and barons.

1. That no consultation can be granted out of term by all the judges, or by any of them in term out of court.

2. That the construction of the statute 1 Eliz. cap. 1. and of the letters patent of high commission founded upon the said act, belongs to the judges of the common law.

3. In what cases the ecclesiastical judges have cognisance, and in what not, belongs to the determination of the judges of the common law.

4. If a counsellor at law in his argument, scandal the king or his government, temporal or ecclesiastical, it is a misdemeanour and contempt of the court, for which he is to be indicted, fined and imprisoned: but if he publish any heresy, schism, or erroneous opinion in religion, he may be convened before the ecclesiastical judges, and there corrected according to the ecclesiastical law.

5. When any libel in the ecclesiastical court contains many articles, if any of them do not belong to the cogni-

sance of the court, a prohibition may be generally granted; and on motion a consultation may be made as to things which belong to their jurisdiction.

6. The consultation in this case being only for heresy, schism, and erroneous opinions, &c. if they convict *Fuller* of heresy, schism, or erroneous opinion, he shall never be punished by the ecclesiastical law.

Of First Fruits and Tenths, 5 Jac. fo. 45.

NOTE, *annates, primitiæ* and first fruits were all one, and were given to the crown by 26 H. 8. cap. 3.

Decimæ, id est the tenth of spiritualties, were paid to the pope until Pope *Urban* granted them to R. 2.

Sir Anthony Roper's Case, fo. 45. & 47.

SIR A. R. was sued before the high commissioners for a pension out of a rectory impropriate, of which he was seised in fee, and was sentenced to pay it, which he refused, and upon this they committed him to prison; this matter appeared on the return to a *habeas corpus*; and it was resolved that the high commissioners had no authority in this case, and that the act 1 *Eliz.* doth not extend to it.

The return was adjudged insufficient, and the prisoner was discharged.

Justice in Wales not to be by Commission, 5 Jac. fo. 48.

JUSTICES in Wales cannot be constituted by commission but by patent. The statute 34 H. 8. by which the king may make laws, &c. for the commonwealth and good quiet of Wales at his pleasure, because it wants the words "his successors," and by reason of the high confidence vested in the king, determined by the death of H. 8.

High Commission, 6 Jac. fo. 49.

IT was resolved, *per totam curiam in C. B.*, that the high commissioners cannot by force of the act 1 *Eliz. cap. 1.* send a pursuivant to arrest any person to answer before them; but ought to proceed by citation. At the *Northampton* circuit, before *Anderson* and *Glanville*, justices of assise, a pursuivant was sent by the commissioners to arrest the body of a man to appear before them, and in resisting the arrest and striving between them, the pursuivant was killed; and if this was murder or not was doubted, which depended on the authority of the pursuivant, and advisement was taken till the next assises, when it was resolved that the arrest was tortious, and by consequence that this was not murder.

Marmaduke Langdale's Case, fo. 50. Vide postea, 58.

M. L. was sued by *Joan* his wife for maintenance before the high commissioners: it was resolved that the prohibition before granted was well maintainable, because it was no offence within the statute. The rule of the court was, that the plaintiff should count against the high commissioners, and upon demurrer joined, the case is to be argued and adjudged upon which the party grieved may have a writ of error.

The Case of the Lords Presidents of Wales and York, fo. 50.

UPON certain complaints exhibited by the lords presidents of *Wales* and *York*, against the judges of the realm, (in the privy council,) for granting prohibitions and writs of *habeas corpus* in proceedings before them, the judges answered to the said complaints.

Whereupon it was resolved by the lords, (of the privy council,) that the instructions of the presidents and councils of *Wales* and *York* should be recorded; that it was necessary that both councils should be within the survey of *Westminster Hall*; and that the presidents and councils should have counsel in every court, and upon motion for any prohibition, day should be given them to show cause.

Case of Heresy, fo. 56.

THE diocesan hath jurisdiction of heresy, but can only proceed by the censures of the church, as at common law, all the statutes against heretics having been repealed. By the 1 *Eliz.* the high commissioners cannot judge any matter to be heresy, but only such as hath been so adjudged by the authority of canonical scripture, and by the four first general councils, wherein the same was declared heresy by the express and plain words of canonical scripture, or such as shall hereafter be determined to be heresy by parliament with the assent of the convocation. At this day no person can be indicted or impeached for heresy before any temporal judge.

Langdale's Case, 6 Jac. fo. 58.

IT was resolved that the court of common pleas may grant a prohibition although no suit be there pending, and that, without original writ.

Banks's Case, 6 Jac. fo. 62.

(PLEADINGS and special verdict in an action on the statute of *Winton*.)

Mouse's Case, 6 Jac. fo. 63.

IN an action of trespass brought by *Mouse* for a casket of a hundred and thirteen pounds; the case was, that while a barge was coming from *Gravesend* to *London*, a tempest arose, so that the barge and all the passengers were in danger of being drowned, if a hogshead of wine, and other ponderous things, were not cast out. It was resolved, *per totam curiam*, that it was lawful for the defendant, being a passenger, to cast the casket of the plaintiff, with the other things in it, out of the barge. The defendant pleaded the special matter, and the plaintiff replied *de injuria, &c.* This issue was tried and the plaintiff was nonsuit. It was also resolved, that although the ferryman surcharge the barge, yet in such a time of necessity, it is lawful for any passengers to cast the things out of the barge, and the owners shall have their remedy against the ferryman; but if there were no default in the ferryman, every one ought to bear his loss. So if a tempest arise at sea, *levanda navis causa*, and for salvation of the lives of men, it is lawful for passengers to cast over the merchandises, &c.

Prohibitions del Roy, 6 Jac. fo. 63.

THE king having been informed, that when question was made of what matters the ecclesiastical judges have cognisance, or in any other case in which there is no express authority in law, he may himself decide it in person; and that the king may take what causes he shall please from the determination of the judges, and may determine them himself; it was answered by me in the presence, and with the consent, of all the judges and barons, that the king in his own person cannot adjudge any case, either criminal or between party and party.

Roberts's Case, 8 Jac. fo. 65.

A PROHIBITION had been granted upon surmise that the plaintiff, being defendant in the spiritual court, had but one witness to prove a demise, to which that court said, that *singularis testis* is not allowable. But this surmise was not allowed, and a writ of consultation was granted.

In the case of *Fuller* against *Clemens & Wiskard* in prohibition 35 *El. B. R.* it was resolved, *per totam curiam*, 1. That where the original belongs to the ecclesiastical court, the determination of all that depends upon it belongs to the same court, although it be matter triable by the common law; but where the original matter belongs to the common law, and is there commenced, and issue is taken upon matter triable by the ecclesiastical law, the judges of our law shall write to the judges of the ecclesiastical court to try it and to certify; 2. If they give sentence according to law no prohibition lies; but if they judge against the rule of law prohibition lies; 3. By the ecclesiastical law a stranger may come in *pro interesse suo*, and when they have jurisdiction of the original cause of the suit, we ought not to draw in question their order and proceeding; 4. That a surmise that he hath but one witness is not sufficient to have a prohibition; which agrees with the resolution in the principal case.

Smith's Case, fo. 69.

IT was resolved upon evidence, by *Coke*, Chief Justice, between *J. S.* who informed upon the statute of usury, and *Smith*, that the parties to the supposed usurious contract shall not be admitted witnesses.

Lady Throgmorton's Case, fo. 69.

IT was resolved that no suit can be brought before the high commissioners for detaining a man's wife, and endeavouring to make separation between man and wife.

The Lord Abergavenny's Case, fo. 70.

RESOLVED that the direction and delivery of a writ does not make a baron or noble, until he come to parliament and there sit, according to the commandment of the writ. But if he is created by letters patent, he is a nobleman immediately.

Oldfield & Gerling's Cases, 8 Jac. fo. 71.

THOMAS OLDFIELD came out of the court of the duchy, and before he came into *Westminster Hall*, with a knife stabbed one *Ferrar*, a justice of the peace, of which he died: and if *Oldfield* should have his right hand cut off was the question before the two chief justices and divers other justices. And it was resolved not, for it ought to be in the hall of *Westminster*, *sedentibus curiis*. So in *Gerling's Case*, 9 *El. B. R.* who smote one in *Whitehall*, sitting in the court of requests, and was but fined and ransomed.

Bishop & Dean's Leases, fo. 71.

A CASE was put to all the justices of *England* which was this: the bishopric of *Waterford* and *Lismore*, being originally two bishoprics, were united and consolidated in the reign of *H. 3.* but the chapters remained several; after which union the bishop aliened lands of the see of *Waterford*, and aliened lands of the see of *Lismore*, with the confirmation of the chapter of *Lismore*. The union was not extant. It was resolved, that inasmuch as the usage hath been after the said union, that the several chapters have severally made confirmations, it shall be intended that the union was originally made in such manner that estates should be severally confirmed: but if the union was made generally, and the bishop eligible by both chapters, estates ought to be confirmed by both. It was resolved that upon a lawful alienation made, with confirmation of the dean and chapter, no *contra formam collationis* lies upon the statute of *Westm. 2.*

Of Convocations, 8 Jac. fo. 72.

IT was resolved by the two justices and divers other justices, 1. That a convocation cannot assemble at their own or the archbishop's convocation, without the assent of the king by writ.

2. That after their assembly, they cannot confer together to constitute any canons, without license of the king.

3. They cannot execute any of their canons without royal assent.

4. They cannot execute any after royal assent, but with these four limitations; 1. That they be not against the prerogative of the king; 2. Nor against the common law; 3. Nor against any statute law; 4. Nor against any custom of the realm.

Piracy, 8 Jac. fo. 73.

THE king's letters to the lord admiral, whereby he granted *bona & chattalla piratorum*, and also, *bona & chattalla deprædata*, were referred to the consideration of the two chief justices and chief baron, and it appeared to us that goods taken from others could not be granted by the king.

Simony, 8 Jac. fo. 74.

IT was agreed *ad mensam* by all the justices and barons, that if the patron for any money, present any person to a benefice with cure, &c. that every such presentation and the admission, institution and induction thereupon are void, although the presentee be not party or privy to it.

Proclamations, 8 Jac. fo. 74.

UPON certain questions moved, respecting the king's proclamations, it was resolved by the two chief justices, the chief baron, and Baron *Altham*, that the king by his proclamation cannot create any offence which was not an offence before. That the king hath no prerogative but that which the law of the land allows him. And if the offence be not punishable in the star-chamber, the prohibition of it by proclamation cannot make it punishable there.

Prohibition, 8 Jac. fo. 76.

RESOLVED that if a man be excommunicated by the ordinary, when he ought not to be, and remains excommunicated for forty days, and is taken upon a writ *de excommunicato capiendo*, no prohibition lies.

Admiralty, fo. 77.

RESOLVED, *per totam curiam*, that if one be sued in the admiralty, and confess the thing to be done, after sentence is given, the court will not grant a prohibition upon surmise that it was done *infra corpus comitatus*, unless it be made to appear to the court that it was done upon land; for although the admission of the party cannot give jurisdiction to a court where it hath none; yet when the court shall be advised that it is merely for vexation and delay that the prohibition is not sued forth until after sentence, unless good cause be shown, it shall not be granted.

Doctor Trevor's Case, 8 Jac. fo. 78.

RESOLVED that a chancellor, register, &c. in the ecclesiastical courts are within the statute 5 E. 6. cap. 16. against corruption in any office which concerns the administration or execution of justice.

Admiralty, 8 Jac. fo. 79.

THE jurisdiction of the admiralty is more ancient than the time of *Ed. 3.* as *Mr. Lambert* affirms. There is a precedent in the time of *Ed. 1.* title *Avowry, 192.* which proves its jurisdiction more ancient than *Mr. Lambert* supposes; upon which book I observe five things.

1. That things done upon the sea do not belong to the court of the king, because no *pais* may be taken there.

2. This proves directly that the admiral had then jurisdiction of things done upon the sea.

3. If part of the matter be done upon the sea, and part in a county, the common law shall have all the jurisdiction.

4. The sea within the jurisdiction of the admiral is described to be out of every county.

5. If a thing be done upon the sea, out of the county, the party may plead it to the jurisdiction of the court.

Honours and Dignities, 9 Jac. fo. 81.

IT was resolved by the two chief justices and others, that the king may erect any name of dignity, which was not before, and therefore may create a dignity by name of baronet. It was resolved that if he does not create him baronet of some place, he shall not have an estate tail, but a fee simple conditional, which shall be forfeited for felony; and that he cannot create any dignity above the dignity of baronet, and under the dignity of baron.

No Accessary in Treason, Petit Larceny and Trespass, 9 Jac. fo. 81.

NOTE, that in trespass and treason, there are no accessaries but all are principals; but in case of felony above the sum of 12*d.* and in case of death, &c. there may be accessaries as well before as after; in case of petit larceny there cannot be any accessary for the smallness of the felony. A. counterfeits the great seal of *England*, and B. knowing that he did counterfeit it, receives him and abets and comforts him; the question is, if B. in this case was guilty of treason. And it seems that he is not; because there can be no accessary in high treason, and he cannot be a principal, because at the time of the counterfeiting, he did not know of it; but if one before the act done, procure another to counterfeit the great seal, it is high treason; for in the law, he himself counterfeits the great seal, and in the indictment he may be charged with the fact of counterfeiting. In case of trespass, he who gives consent and aid to the trespass is a principal.

Sir William Chancey's Case, 9 Jac. fo. 82.

SIR William Chancey was brought up by *habeas corpus*, the return to which was, that he was committed by force of a warrant from the high commissioners; the warrant shows for cause of his commitment, that being at the suit of his lady convented before the commissioners for adultery, &c. and by his own confession convicted thereof, he was by order of the court enjoined to allow his wife a competent maintenance, and to perform such submission and other order for his adultery, as by law should be enjoined him; which expressly he refused to do.

It was moved that this return was insufficient; 1. Because adultery is not such an enormous offence that it shall be punished by the high commissioners, and the wife cannot sue before them for alimony, which was allowed

by *Coke*, &c. but *Walmsley* doubted of adultery; 2. That by the statute 1 *Eliz.* the high commissioners cannot imprison in this case, if it were within their jurisdiction: which was agreed by the court. Upon this *Sir William Chancey* was bailed: also it was resolved, *per totam curiam*, that when it appears upon the return that the imprisonment is not lawful, the court may discharge him; but in this case the court thought fit rather to bail him. Also it was resolved, the return was insufficient in form; 1. Because it did not show when the adultery was committed; 2. He was enjoined to allow his wife a competent maintenance without any certainty; and to perform such submission, &c. and it is uncertain what order they will take.

Empringham's Case, 9 Jac. fo. 84.

A BILL was exhibited in the star-chamber against *Robert Empringham*, viceadmiral in the county of *Tork*, and others, that they had fined and imprisoned divers subjects, which no judge of the admiralty can justify, for it is not a court of record, and that *Empringham* had caused divers persons to be cited to appear before him, for things which were determinable at the common law. Wherefore, by sentence of the star-chamber, they were fined and imprisoned.

High Commission, 9 Jac. fo. 84.

THE clause in the 1 *Eliz.* by which all such jurisdictions, &c. as by any spiritual power or authority have heretofore, or hereafter lawfully may be exercised or used, &c. shall be annexed to the crown, was relied upon, by the Archbishop of *Canterbury*, in the council chamber, to prove that jurisdiction to fine and imprison in all ecclesiastical causes is given to the king; to which I answered that what he urged was against law for divers causes.

1. That if the word *lawfully* were omitted, this act being an act of restitution, ought to be intended of lawful jurisdictions, &c.

2. This word *lawfully* extends as well to times past as to times future: and all this was affirmed by all the justices of the common pleas.

3. It was said by me, that before the statute of 1 *Eliz.* no ecclesiastical judge could fine or imprison for any spiritual offence, unless by authority of parliament: and it was affirmed by all the justices that although in some cases they may fine and imprison, therefore to say, that by this clause, they may do so in all cases, was not worthy of an answer.

Stockdale's Case, 9 Jac. in the Court of Wards, fo. 86.

THE king by his letters patent granted to *William Stockdale* such and so many of the debts, duties, arrearages and sums of money, being of record in our court of exchequer, court of wards, &c. as shall amount to the sum of a thousand pounds, &c. In this case it was resolved, 1. That the grant is void for uncertainty, for by the grant, no debt in certain passes; 2. That the word *arrears*, being coupled with the words debts, duties and sums of money, would be intended of arrearages of things personal only, were it not explained by the proviso in the end of the patent.

Manslaughter, 9 Jac. fo. 87.

DIVERS men were playing at bowls, and two of them quarrelled; the third man who had no quarrel, in revenge of his friend, struck the other with a bowl, of which blow he died; this was held manslaughter, because it happened upon a sudden motion in revenge of his friend.

Two boys were combating, one of them was scratched in the face and his nose voided a great quantity of blood; his father, seeing his son so abused, and the blood running from him, and his clothes and face all bloody, took a cudgel and went three quarters of a mile to the place where the other boy was, and struck him upon the head, upon which he died. This was held but manslaughter.

High Commission, 9 Jac. fo. 88.

A HIGH commission in causes ecclesiastical was published, and I was commanded to sit by force of the commission, which I refused, because I was unacquainted with the commission, and did not know what it contained.

Fishing in the River Thames, 9 Jac. fo. 89.

AN information was tried at bar upon the stat. 2 H. 6. 15. against fastening in the river *Thames* any nets or engines called trincks, or any many of nets, to any posts, boats, &c. to stand continually, day and night, &c. The defendants had fastened trincks in the river *Thames* to boats, day and night, for so long time as the tide did serve, and did not say *continually*. The question was, if this was within the statute, and it was resolved that it was, for the nets called trincks can stand but so long as the tide serves; and the word *continually* shall be taken continually so long as they may stand to take fish, and as the time of fishing endures, be it in the day or night; otherwise the law would be of no effect.

Shulter's Case, 9 Jac. in the star-chamber, fo. 90.

SHULTER gave directions to make certain leases, and the lessees by the covin and aid of a scrivener drew them otherwise than he had directed. *Shulter* by reason of his great age was blind, and the scrivener declared to him that the leases were made in all points according to his direction; upon this *Shulter* sealed and delivered them as his deeds. It was resolved by the chancellor, and the two chief justices, that the indentures could not bind him.

Sir Anthony Ashley's Case, 9 Jac. fo. 90.

SIR Anthony Ashley exhibited a bill against *Creighton* and others for a conspiracy to indict him of a capital crime. It was resolved by all the court, that the bill was maintainable although the party accused was not indicted and acquitted; also in the case at bar, be *Sir Anthony* guilty or not guilty, the defendants are punishable, for promising bribes and rewards to suborn a person to accuse the plaintiff, and for making articles to share and divide his estate after his attainder.

It was resolved, that if felony be done, and one hath suspicion, upon probable cause, that another is guilty of it, he may arrest the party suspected, to the end that he may subject him to justice. But in this case three things are to be observed.

1. That a felony be done.
2. That he who doth arrest, hath suspicion upon probable cause, which may be pleaded, and is traversable.
3. That he who hath the suspicion arrest the party; for he cannot command another to do it.

Also it was resolved that if felony be done, and the common fame and voice is that one hath done it, this is good cause for him who knows of it to arrest the party.

Writ de Heretico Comburendo, 9 Jac. fo. 93.

IT was consulted, if at this day, upon conviction of a heretic before the ordinary, the writ *de heretico comburendo* lieth; and it seems clearly to me that it doth not. But *Fleming*, Chief Justice, and others, upon being consulted, certified that it doth lie.

The Lord Vaux's Case, 10 Jac. fo. 93.

RESOLVED that a lord shall not be tried *per pares*, for a *premunire*.

Countess of Shrewsbury's Case, 10 Jac. fo. 94.

AT a select council *scil.* the lord chancellor, the chief justices, the master of the rolls, &c. it was resolved, by the justices and master of the rolls, that the denying to be examined before the lords of the council is a contempt against the king, his crown and dignity.

Robert Scarlet's Case, 10 Jac. fo. 98.

ROBERT SCARLET, by confederacy with the clerk, procured himself to be sworn of the grand inquest without being returned by the sheriff, with intent to indict his neighbours maliciously, upon which offence he was indicted upon the statute 11 H. 4. c. 9. and found guilty. Upon consideration had of divers points, it was held, 1. That justices of assise have power to punish this offence by virtue of their commission of *oyer and terminer*; 2. That Robert Scarlet was an offender within the 11 H. 4. which statute is partly affirmative of the common law. In affirmance of the common law, no indictment shall be found by any person named to the justices, but by inquest of lawful people of the king, returned by the sheriff; 3. The 3 H. 8. 10. by which the justices, &c. in open court may alter the panel returned by the sheriff to inquire for the king only, &c. hath not altered the law as to the offence of Scarlet; 4. The said act, 11 H. 4. hath made a new law, that any indictment found against the act shall be void.

Baker & Hall's Case, 10 Jac. fo. 100.

UPON consideration of the statute 3 H. 7. cap. 14. it was resolved, 1. That when the woman taken against her will, &c. hath nothing, nor is heir apparent; and, 2. If she be not married or defiled, it is not within the statute.

Privilege of Priests, fo. 100.

NOTE. I saw a report in the time of Queen *Mary*, upon the statute 50 *Ed. 3. cap. 5.* 1 *R. 2. cap. 15.* concerning arresting them of holy church, that the said statutes are but in affirmance of the common law.

Crown, fo. 100.

NOTE, if a man be convicted, or hath judgment of death for a felony, or be outlawed, and by that attainted of felony, he shall never answer by the common law to any felony done before the attainder, so long as the attainder remains in force. If a man be adjudged to be hanged and hath his pardon, he shall never answer to any felony before. *Aliter*, if the first attainder be reversed by error.

Estray, fo. 101.

A MAN seised of a manor to which he hath stray appendant, takes a stray, and within the year and day lets the manor; it was resolved that the lessee shall have the stray.

Doctor Hutchinson's Case, fo. 101.

RESOLVED, *per totam curiam*, that if any person take money, &c. or other profit for any presentation to a benefice with cure, although the presentee be ignorant of it; yet the presentation, admission and induction are void by 31 *H. 8. cap. 6.* and the king shall have the presentation *hac vice*; but if the presentee be not cognisant of the corruption, he shall not be within the clause of disability in the said statute.

Hugh Manney's Case, fo. 101.

A BILL was exhibited in the star-chamber at common law for perjury in a witness; and it was resolved that it was punishable by the common law before any statute; and although the witness deposed for the king.

Haye's Case, in the Court of Wards, fo. 102.

RESOLVED that an office found upon a writ of *diem clausit extremum*, does not conclude the jurors upon a *de-venerunt*, but by the express rules of the writ they may find the truth of the tenure, notwithstanding the first office.

Award of Capias Utlagatum by Justices of the Peace, fo. 102.

THE opinion of all the court of common pleas was, that if one be outlawed before the justices of assise, or justices of peace, upon an indictment for felony, they may award a *capias utlagatam*. And so was the opinion of all the court of exchequer as to justices of the peace.

Hersey's Case, Star-Chamber, fo. 103.

A BILL was exhibited against several defendants for forging a will; upon the hearing there appeared no presumption against the defendants. It appeared to the court that the said bill was preferred of malice and spite, to slander the defendants; and because they had no remedy at the common law, it was resolved that by the course of the court, and according to former precedents, they might give damages to the defendants: which was done.

Thomlinson's Case, 2 Jac. fo. 104.

TO a *habeas corpus* to the marshal of the admiralty, it was returned that *Thomlinson* was committed *ex eo quod Thomlinson vinculo sacramenti astrictus ad respondendum quibusdam articulis contra eum, &c. sub pœna quinque librarum, &c. contumaciter examen suum subire recusavit*. It was resolved by the court of common pleas,

1. That the court of admiralty hath no jurisdiction of things done beyond sea.

2. That it is not a court of record, and consequently, cannot assess any fine.

3. That the return above mentioned was insufficient, being too general, because it is not specified for what cause or matter *Thomlinson* was examined.

Corven's Case, fo. 105.

IT was resolved that if a person hath a house and land in the parish, time out of mind, and that he and all those whose estate he hath, have had a seat in an aisle of the church, so that the aisle is sole and proper to his family, and they have maintained it at their own charge, if the bishop would dispossess him, he shall have a prohibition. But if a question arise concerning a seat in the body of the church, it is to be determined by the ordinary.

Note, that 10 *Jac.* in the star-chamber between *Hussey* and *Leyton* and others, it was resolved that if a man have a house in a parish, and time out of mind he and all those whose estate he hath, have used to have a certain pew in the church, if the ordinary will displace him, he shall have a prohibition.

Earl of Shrewsbury's Case, fo. 106.

WHEN the possessions of a nobleman, with which he is to support his dignity, are taken away by act of parliament, his dignity also is taken away.

Jurisdiction of the Court of Common Pleas, 2 Jac. fo. 109.

THE justices of the king's bench and barons of the exchequer, being required to deliver their opinions whether there was any authority in our books, that the justices of the common bench may grant prohibitions upon information; their opinion was, that the precedents of each court are sufficient warrants for their proceedings; and as for a long time prohibitions upon information, without any other plea pending, have been granted, they were unanimously agreed to give no opinion against the jurisdiction of the court of common bench in this case.

Parliament in Ireland, 10 Jac. fo. 109.

IT was resolved by the two chief justices and others, that the acts which are to be laid before the parliament of *Ireland*, and are first transmitted hither under the great seal of *Ireland*, ought to be preserved here in the chancery; 2. If they be affirmed, they ought to be transcribed under the great seal and returned to *Ireland*; 3. If the acts transmitted hither be in any part altered or changed here, the act so altered and changed ought forthwith to be returned under the great seal of *England*; but the transcript under the great seal of *Ireland*, which remains here, shall not be amended.

The King's Prerogative in Dignities, quare, fo. 112.

NOTE, that *Camden*, king at arms, told me that some held, that if a baron die, having issue divers daughters, the king may confer the dignity on him who marries any of them.

Ecclesiastical Jurisdiction, fo. 112.

NOTE, (by *Linwood*.) that it appears that by the canons ecclesiastical, none may exercise ecclesiastical jurisdiction unless he be within the orders of the church, but now by 37 H. 8. *cap.* 17. a doctor of law or register, although he be a layman, may execute ecclesiastical jurisdiction.

Custom of London, 11 Jac. fo. 113.

NOTE, that if a man gives to one of his children a certain sum in his life, and afterwards dies, although this is not given as a child's portion, yet it shall be sufficient for him; but if the father by writing or by will declares that it is but part of a child's portion, then he shall have a full child's part.

Devise, fo. 113.

NOTE, it was holden by the judges in the king's bench, that if a man being possessed of a house and term for years, devises them to pious uses for years, and then demises them to his wife for life, the remainder over, and dies, all his debts being paid; if the widow enters generally, and converts the profits to her own use, and not to pious works, this is a determination of her election.

Haynes's Case, fo. 113.

RESOLVED, that the property of a winding sheet remains in him who had the property when the dead body was wrapped therein.

Earl of Derby's Case, in Chancery, 11 Jac. fo. 114.

IT was resolved, 1. That the *Chamberlain of Chester* cannot decree in any cause wherein himself is party.

2. If the defendants dwell out of the county palatine of *Chester*, complaint may be made by the party who hath cause of complaint in equity in the chancery here.

3. The king cannot grant a commission to determine any matter of equity.

4. The plaintiff may allege things transitory, although in truth they be within the county palatine, to be done in any place within *England*, and the defendant may not plead it to the jurisdiction.

Forms and Orders of Parliament, fo. 115.

THE king, the first day of parliament, shall sit in the upper house, and he, or the lord chancellor by his commandment, shall show the causes of calling the parliament, and then shall command the commons to choose a grave and learned man for their speaker, upon which the commons shall assemble themselves in the lower house, and choose a speaker who shall disable himself, and pray that they would proceed to a new election.

Two or three days after, the commons shall present their speaker in the upper house to the king who shall disable himself to the king, and after he is allowed, shall make an oration, and in the conclusion pray the four usual petitions; which oration being answered by the lord chancellor, and his petitions allowed, the speaker and the commons shall depart to the house of commons, where the speaker shall request the commons to assist him and favourably accept his proceedings.

When a bill is read in either house, the lord chancellor, or the speaker, opens the parts of the bill so that each member may understand the intention of each part. When it is read the second time, the speaker in the lower house makes question whether the bill shall be engrossed. Those who would have the bill engrossed, shall say yea; and those who would not, say no. But in the upper house when a question is made about engrossing, if there be no

contradiction, the lords do not deliver their assent or dissent; but if there be any contradiction it is tried *seriatim* by content, or not content; but the lord chancellor, or speaker, shall not repeat a bill or amendment but once.

When a bill is committed to the second reading, if it be amended, the amendment shall be written in a paper directing to the line, and between what words the amendments shall be put in, or what words shall be interlined, and then all shall be engrossed in a bill.

If a bill pass in one house, and is amended in the other house, the amendments are engrossed with references as above, and the bill, with the amendments, is returned. The amendments are read three times, and are then inserted in the body of the bill; but the entire bill shall not be read again in the house where it first passed, for no bill is to be read more than three times.

No lord ought to speak to a bill twice in one day: Also no member of the house of commons ought to speak more than once to one bill in one day, unless sometimes by way of explanation. No private bill ought to be read before the public bills, unless one of the houses require it.

In the house of commons, those who are for a new bill go out of the house, and those who are against it remain in the house: in the upper house, two lords are appointed, one on each side, to number the voices. In both houses, he who first stands up to speak shall speak first.

When a bill is engrossed at the third reading, it may be amended in the same house, in matter of substance, or for an error of the clerk in engrossing.

Walter Chute's Case, 12 Jac. fo. 116.

WALTER CHUTE petitioned the king to erect an office for the registering of all strangers within the realm except merchant strangers, and to grant the office to the petitioner with or without a fee; which petition was referred to me, and upon conference with the justices and barons, it was resolved that the erection of new offices for the benefit of a private man was against law; that it was inconvenient, as princes of other countries will take offence at it; and it is to be considered what breach it will be of former treaties.

Sir Stephen Procter's Case, fo. 118.

IN an information in the star-chamber, at the hearing eight lords were present, four of whom condemned, and four, of whom the lord chancellor was one, acquitted the defendant. And the question was if he shall be condemned or acquitted; and the matter was referred to the two chief justices and the king's counsel, and they resolved that this question must be determined by the precedents of the star-chamber. Two precedents only were produced; in *Gibson and Griffith*, 39 *Eliz.* four gave judgment that the defendants were guilty, but the other four, whereof the lord chancellor was one, pronounced the defendants not guilty, and no sentence of condemnation was ever entered, because the lord chancellor was one of the four who acquitted him. In an information against *Catharine* and others, 45 *Eliz.* four found the defendants guilty of forgery, but the others, of whom the lord chancellor was one, gave sentence that they were guilty of a misdemeanor only, and not of forgery, which decree was entered according to the lord chancellor's voice.

Exaction of Benevolence, fo. 119.

NOTE, the exaction of benevolence began 12 *Ed. 4.* By 1 *R. 3. cap. 2.* it was declared illegal, but was taken by the king in 6 *H. 7.*, 16 *H. 8.* and 26 *H. 8.* It was resolved, 40 *El.* by all the justices and barons, that a free grant to the queen, without coercion, is lawful.

Ireland and Freeborough, 12 Jas. fo. 120.

IN the case of *Dungannon*, in *Ireland*, it was resolved that a power to elect, burgesses ought to be vested in the entire corporation, *scil.* provost, burgesses and commonalty, and that a grant to the inhabitants of a place not incorporated, to elect burgesses, is void.

Felons' Goods, 12 Jac. fo. 121.

IT was resolved by the chief baron and the justices, that the goods and chattels of a felon are forfeited immediately by his conviction.

Ann Hungate's Case, in the Star-Chamber, 11 Jac. fo. 122.

A BILL was exhibited against the defendants charging them with practice in procuring a fine to be acknowledged by an infant. It was resolved by the two chief justices and chief baron, that forasmuch as no corruption and circumvention were proved in the commissioners who took the acknowledgment of the fine, or in any of the parties, for which they might be indicted, the fine shall stand. When an infant levies a fine, if it be not reversed during his minority, it is unavoidable, and the heirs of the infant have no remedy by law to reverse it. If the commissioners had known that the conusor was within age, it would have been a misdemeanour in them to take his acknowledgment. In *Cavendish against Worsley and others*, 24 and 25 *Eliz.* in this court, the commissioners knew that the conusor was within age, and were fined; but the fine stands. 38 and 39 *Eliz.* In this court, a fine was fraudulently acknowledged in the name of A. G. but there was no sentence to draw the fine off from the file.

Mansfield's Case, fo. 123.

23 *Eliz.* in the court of wards. An idiot was taken from his guardian and kept in secret until he acknowledged a fine of his lands; and by indenture the use of the fine was declared to the cognisee and his heirs; it was resolved that as the fine, which is the principal, bound the idiot, he shall not be disabled to limit the uses, which are but the accessory.

Warcombe and Carrel's Case, fo. 124.

6 *Eliz.* in the star-chamber. An infant feme covert, by fine, conveyed her estate to herself and husband in tail, remainder to her right heirs: the fine was adjudged good.

Appeal of Robbery, fo. 125.

IN a record, 42 *Ed. 3.* of an appeal of robbery, the defendants were found not guilty, and proceeded against the appellant and her abettors, out of which record these things are to be observed; 1. Although by statute *Westm. 2. cap. 21.* in this case *justiciarii, puniant appellatorem per prisonam unius anni*, yet, as the appellant *pregnans fuit & in periculo mortis*, she was let out upon mainprise.

2. That the defendants recover their damages either wholly against the principal or wholly against the abettors.

3. That the damages, which each of the defendants has sustained, shall be severally assessed.

4. That although the appellant be not sufficient to pay, yet his body shall be taken *ad satisfaciendum*.

5. That the abettors are not concluded by the finding of the jurors in the appeal, but must be distrained *ad respondendum*.

Duress per Gaoler, fo. 127.

7 *Ed. 3.* Indictments of gaolers and others for duress and extortion.

False Affidavits, fo. 128.

IN an action on the case, it was resolved, *per totam curiam*, that if a sumner return a party certified upon his oath in court christian, when in truth he was not, and he is pronounced *contumax*, and excommunicated, he shall have an action on the case. It was resolved that perjury, by which damage accrues, may be punished as a misdemeanor at the suit of the king, and the party may also have his action to recover damages.

In like manner it was agreed, that if one make a false affidavit by which the party is arrested and molested by process of contempt, he may have an action on the case and recover damages.

Hawkeridge's Case, 14 Jac. fo. 129.

TO a *habeas corpus* to the marshal of the admiralty, the return was *quædam causa spoli civilis & maritima contra, Hawkeridge pendet inde pro judicio, & sententia parata sit, &c. qui Hawkeridge sic commissus remanet donec, &c.* Time was given to amend the return, and show cause why sentence was not given; it was not amended, and to another *habeas corpus* there was the same return. This return was adjudged insufficient in this respect, and also because,

1. *Spolii* is uncertain; the things ought to be specified with more certainty, and the return does not show their value.

2. *Maritima* is *super littus*, or *in portu maris*, which are not within the jurisdiction of the admiral, but he ought to have said *super altum mare, infra jurisdictionem admiralii*. Wherefore the party was bailed.

Judgment and Execution in Treason and Felony, fo. 130.

NOTE, it was said by some, that when judgment to be hanged is given, the king cannot alter it and command that the party be beheaded. But when one is attainted of treason, the king may pardon all the execution except decapitation.

Oath before Justices, 9 Jac. fo. 130.

UPON the statute 7 Jac. cap. 6. it was resolved that justices of the peace may make a special warrant to constables, &c. to have the bodies of the parties who are to take the oath according to the statute; but the constables cannot break the houses of the parties named in their warrants, for they are not offenders until they refuse to take the oath.

Earl of Northampton's Case, 10 Jac. fo. 132.

IN an information in the star-chamber against several defendants for scandal of the Earl of *Northampton*, it was resolved by eleven judges present, that the publishing false rumours concerning the king or the grantees of the realm, was in some cases punished by the common law: but of this there were divers opinions. Yet it was resolved, in general,

1. That the words and rumours themselves ought to be false and horrible; of which discord or slander may arise between the king and his people, or the grantees of the realm, *West. 2. cap. 24.* or between the lords and commons *2 R. 2. c. 53.*

2. The persons of whom they are to be spoken are the nobles, or any of the great officers of the realm.

3. If one hear such false and horrible rumours, either of the king or any of the grantees, it is not lawful for him to relate to others that he hath heard the words from J. S. And this appears by the statute, viz. that the party shall be imprisoned until he find out the party who spoke them.

4. If the offenders at the bar had been indicted upon these statutes, judgment could not have been given that they should have been imprisoned until they found their author: for G. did not relate that he heard the words of C. but related them as of himself. And it was resolved that if A. say to B. "did you not hear that C. is guilty of treason," it is tantamount to a scandalous publication: and in an action for slander of a common person, if J. S. publish that he hath heard J. N. say that J. G. was a traitor or thief; if the truth be so, he may justify. But if J. S. publish that he hath heard generally, without a certain author, that J. G. was a traitor or thief, an action on the case lies against him.

Estwick's Case, 10 Jac. in the Court of Wards, fo. 135.

PHILIP & MART granted land *tenendum de nobis & successoribus nostris ut de manerio nostro de East Greenwich in capite per servitium, &c.* It was resolved that notwithstanding the words *in capite*, it was held of the king as of the honour, and not *in capite*.

THE THIRTEENTH BOOK.

Willowe's Case, 6 Jac. in the Common Pleas, fo. 1.

IN trespass on the copyhold of the plaintiff, it was resolved, 1. That where a fine is assessed on the admission of a copyholder, the lord of the mannor ought to assess a certain time and place where the same should be paid ; 2. That although the fine be uncertain and arbitrable, yet it ought to be *secundum arbitrium boni viri*; and ought to be reasonable and not excessive ; 3. If the lord and tenant cannot agree as to the fine, but the lord demands more than a reasonable fine, it shall be decided by the court, and the court shall adjudge what shall be a reasonable fine ; 4. That the fine in the case at bar, viz. for a cottage and an acre of pasture, five pounds six shillings and eight pence, being two years value, is unreasonable.

Porter and Rochester's Case, 6 Jac. in the Common Pleas, fo. 4.

IN a prohibition to the court of arches it was resolved, 1. That all acts of parliament shall be expounded by the judges of the laws of *England*, although they concern ecclesiastical jurisdiction ; 2. That the Archbishop of *Canterbury* is restrained by the 23 *H. 8. cap. 9.* to cite any one out of his own diocess, or peculiar jurisdiction. If any judges prohibited by an act of parliament proceed against the act, a prohibition lies,

Edwards's Case, 6 Jac. fo. 9.

THE high commissioners objected divers articles against *Edwards* for defamation of *Walton*, doctor of physic, and one of the high commission in the diocess of *Exeter* in his profession of physic, and to examine him as to the meaning of certain letters he had published respecting the said *Walton*. It was resolved that suit for defamation does not lie before the high commissioners; 2. That the ecclesiastical judge cannot examine a man upon oath as to his intention and thoughts: in cases where a man is to be examined upon oath, he ought to be examined only as to acts and words.

Taylor and Shoile's Case, 6 Jac. fo. 11.

IN an information in the exchequer upon the statute 5 *El. cap. 4.* that the defendant exercised the art of a brewer, and did not exercise it at the making of the said act, nor had been apprentice, for seven years: upon a writ of error it was resolved by the two chief justices, that the trade of a brewer is within the said act.

The Case of Modus Decimandi, 6 Jac. in the Common Pleas, fo. 12.

MOTION for a prohibition because a person sued for tithes of *silva cædua* under twenty years' growth, in the Weild of *Kent*, where, by custom, tithes of wood were never paid. If such custom *in non decimando* for all lay people within the said weild, were lawful or not, was the question. And for the prohibition it was said that such general custom might well be, and that it shall be tried by the common law.

Baron and Boys's Case, 6 Jac. in the Exchequer, fo. 18.

IN an information upon the 5 *E. 6. cap. 14.* of engrossers; it was resolved by the barons of the exchequer, that apples are not within the said act.

Menvil's Case, 27 Eliz. in Chancery, fo. 19.

N. MENVIL seised of lands in fee, took a wife and levied a fine of said lands with proclamations, and afterwards was indicted and outlawed of high treason and died: the conusees convey the lands to the queen, who is now seised; the five years pass after the death of the husband, and his heirs, by writ of error in B. R., reverse the attainder; and thereupon the wife petitions the queen for her dower, which petition was sent into the chancery.

1. It was resolved that the wife should be endowed, and that the fine with proclamations did not bar her; for she is within the saving of the 4 H. 7. c. 24. to all persons who were not parties to the fine, of such rights as shall accrue to them after the fine engrossed, and proclamations made, who shall pursue their right within five years after, it accrued. And in this case the right of dower accrued to the wife after the reversal of the attainder, by reason of her title before the fine, notwithstanding that to some intents the reversal of the judgment has relation to the time of the first judgment given, but the law will never make such a construction to advance a wrong, or to defeat collateral acts which are lawful, and principally if they concern strangers; true it is, that the plaintiff in the writ of error, when the judgment is reversed, shall have the mesne profits from the time of the first judgment, but the defendant has remedy, notwithstanding the reversal, against all trespassers in the *interim*, otherwise the law would make a construction by relation to discharge wrong doers, and would charge the defendant, who, perhaps, has good right, with the whole. Therefore, the plaintiff in error shall not have an action of trespass for a trespass mesne, because he shall recover all the mesne profits against the defendant.

2. As to the objection that the demandant in the petition ought to have an office found for her, it was resolved that it was not necessary, because the title of dower stood with the queen's title and affirmed it.

And the case put on the other side, that if a man seised in fee, marries a woman of eight years, and before her

age of nine years he aliens in fee, and afterwards she attains the age of nine years, and her husband dies, she shall not be endowed, was denied by the court, and it was resolved that the marriage, seisin, and age need not concur all at one time, but it is sufficient if they happen during the coverture; so if she elope from her husband, and during the elopement the husband alien, and afterwards the wife is reconciled, she shall be endowed: so if a man have issue by his wife, and the issue dies, and afterwards land descends to the wife, or she purchases in fee and dies without other issue, the husband shall be tenant by the curtesy. But if a man marries an alien, and aliens his land, and afterwards his wife is made a denizen, she shall not be endowed, for her capacity to take began only by her denization; but in the other cases there was no incapacity, but only a temporary bar; as if the wife is attainted of felony, and the husband aliens, and afterwards the wife is pardoned, she shall be endowed.

Sprat and Heal's Case, 44 Eliz. in the King's Bench, fo. 23.

RESOLVED that the plaintiff cannot sue in the spiritual court for the treble value of tithes, but for the double value he may.

Neale's and Rowe's Case, 6 Jac. in the Common Pleas, fo. 24.

IT was resolved that the ordinary, &c. cannot take any fee for the probate of a will, but that which is limited by the statute 21 H. 8. cap. 5.

Aid to the King, 6 Jac. in the Common Pleas, fo. 26.

A QUESTION was moved to the court whether tenant in burgage should pay aid to the king to make his eldest son a knight, and the point rests upon this, if tenure in burgage be a tenure in socage; for by the ancient common law every tenant by knight's service and in socage, was to give his lord a reasonable aid to make his eldest son a knight, and to marry his eldest daughter. It appeared that tenure in burgage is a tenure in socage, and is subject to the payment of aid.

Prohibitions, 6 Jac. fo. 30.

I WAS sent for by the king to answer a complaint made by the president of *York* against the judges of the common law for granting prohibitions to the president and council of *York*; and the king was well satisfied with the reasons which I gave for our proceedings.

Repair of Bridges, &c. 7 Jac. fo. 32.

OF common right all the county shall be charged to the reparation of a bridge, when no other is bound to repair it; but he who hath toll of those who pass over the bridge, ought to repair it. Also a man may be bound *ratione tenuræ* and a corporation, by prescription, to repair. So of a highway, of common right all the county ought to repair it; but some may be particularly bounden as aforesaid. He who hath the land adjoining ought of common right to scour and cleanse the ditches next to the way to this land; but without prescription he is not bound to repair the way. So of a common river, of common right all who have ease and passage by it, ought to cleanse and scour it. But he who hath land adjoining a river is not bound to cleanse it, unless he hath a toll or other profit.

Sir William Read and Booth's Case, 7 Jac. fo. 34.

IN the star-chamber, it was resolved by the two chief justices and the chief baron, that if one be convicted of forgery, or publication of any writing concerning freehold, &c. within the first branch of the 5 *Eliz.* 1. or concerning interest or term for years, &c. within the second branch, and afterwards offend either against the first or second branch, it is felony. The time of the forgery is not material, be it before or after the offence was in truth committed, if it be committed before the exhibiting of the bill; but if the date of the writing supposed to be forged, is mistaken, the defendant cannot be condemned by a deed of another date, for *that* is not the offence complained of in the bill.

Case of Sewers, 7 Jac. fo. 35.

IT was resolved by the two chief justices and the chief baron, that the authority given by the commission of sewers did not extend to mills, causeys, &c. erected before the time of *Ed.* 1. unless they have been enhanced and exalted above their former height.

The Case De Modo Decimandi, 7 Jac. fo. 37.

THE chief justice and myself, and *Daniel*, and *Williams*, justices, attended before the king and privy council to answer certain objections of the Archbishop of *Canterbury* and others, that the question *de modo decimandi* shall be tried before the ecclesiastical judge; but it was said by us that the trial *de modo decimandi* ought to be by the common law by jury.

Bedell and Sherman's Case, 39 & 40 Eliz. fo. 47.

ROBERT BEDELL and Sarah his wife, farmers of the rectory of *Litlington*, brought an action of debt against *Sherman*, and declared and showed a demise, by force whereof they were possessed of the said rectory, and that the defendant was tenant of lands which ought to pay tithe to the rector of *L.* and the defendant *grano seminat* 200 acres, parcel, &c. and that the tithes of the same did amount to 150*l.* which the defendant did not divide from the nine parts, but took and carried away. The jury found that the defendant owed 55*l.* and as to the residue *nil debet*. In arrest of judgment divers matters were moved; that *grano seminata* was too general, but the kind of corn ought to be expressed. If the husband and wife should join, or if the husband alone should have the action. And upon solemn argument the judgment was affirmed.

John Baillie's Case, 7 Jac. in the Court of Wards, fo. 48.

IT was found by writ of *diem clausit extremum*, that J. B. was seised of a messuage or tenement, late parcel of the demesne lands of the manor of N. in the county of H.; it was holden by the two chief justices and the chief baron,

1. That *messuagium vel tenementum* is uncertain; for *tenementum* is *nomen collectivum*, and may contain land or any thing which is holden.

2. That the whole office is void, because no town is mentioned where the messuage or tenement lies.

Covenants to Uses, 7 Jac. in the Court of Wards, fo. 48.

A MAN seised in fee-simple covenants for the advancement of his son, and of his name and blood and posterity, to stand seised to the use of himself for life, and afterwards to the use of his eldest son and such woman as he shall marry, and to the heirs males of the body of the son; the father dies, the son takes a wife and dies. It was resolved by the two chief justices and chief baron, that the wife shall take an estate for life; because, 1. The consideration extends to her; 2. The estate of the son shall support the use to the wife; and when the contingency happens, his estate shall be changed according to the limitation, *scil.* to the son and wife, &c.

Spary's Case, 7 Jac. in the Court of Wards, fo. 49.

J. S. seised in fee in right of his wife of lands holden of the crown by knight's service, had issue by her and aliened; the wife died, the issue of full age, the lands continue in the hands of the alienée, and afterwards the special matter is found by office. It was resolved that the king should not have the mesne profits, because the alienée was in by title; and the heir has no remedy for them until entry.

The Earl of Cumberland's Case, 7 Jac. in the Court of Wards, fo. 49.

IT was found by office that *George Earl of Cumberland*, seised in tail of certain castles and manors, by fine and recovery conveyed them to the use of himself and wife, for their lives, and afterwards to the heirs males of his body, and for want of such issue to the use of *Francis*, now Earl of *Cumberland*, and to the heirs males of his body begotten; and for want of such issue to his own right heirs; and afterwards by indenture conveyed the fee-simple to the said *Francis*; and afterwards died without heir male of his body, and further found that the Countess of *Cumberland* was alive, and took the profits of the premises

from the death of the said earl. It was resolved, that by this office the king was not entitled by the common law, by which a dying seised was necessary, but by the statutes 32 and 34 H. 8.; 2. It was objected that it doth not appear that the estate of the wife continued in her until the death of the earl, for the husband and wife had aliened to another; but it was resolved that the office was *prima facie* sufficient, and if there be such alienation it must be shown on the other part.

Wills's Case, 7 Jac. in the Court of Wards, fo. 50.

HENRY WILLS being seised of the fourth part of a manor in socage tenure *in capite*, made a feoffment thereof to the use of himself for life, and afterwards to the use of *Thomas Wills* his second son in tail, remainder over in tail, remainder to his right heirs; and afterwards died seised, *William Wills* being his son and heir of full age; *Thomas* the second son entered as into his remainder. It was resolved by the two chief justices and chief baron, that the king should not have primer seisin in this case.

The Case of the Admiralty, 7 Jac. fo. 51.

A BILL was preferred in the star-chamber against Sir *Richard Hawkins*, viceadmiral of the county of *Devon*, charging that he did receive, abet and comfort, within the body of the county, certain notorious pirates, and for bribes and rewards suffered them to be discharged. What offence this was, was referred to the two chief justices and the chief baron: and it was resolved, 1. That the admiral hath jurisdiction only of things done upon the sea; 2. But, notwithstanding, the judge of the admiralty may award execution within the body of the county.

And it was resolved, that in this case, a receiver and abettor, by the common law, could not be indicted or convicted, because the common law cannot take consuance of the original offence; and, consequently, where it cannot punish the principal, it shall not punish the accessory.

*Pettus and Godsalue's Case, 7 Jac. in the Common Pleas,
fo. 54.*

THE third proclamation upon the foot of a fine was said to have been made in the sixth year of the king, when it ought to have been *anno quinto*, and the fourth proclamation was altogether left out; but because it appeared, upon view of the proclamations, *in dorsis* upon the record, and the notes of the fine remaining with the chirographer, and the book of the chirographer, in which the proclamations were first entered, that they were duly made, it was adjudged that the errors aforesaid should be amended.

Sammes's Case, 7 Jac. in the Court of Wards, fo. 54.

JOHN SAMMES being seised of *Grany Mead* by copy of court roll of a manor holden of the king by knight's service *in capite*; T. B. lord of the manor by deed indented made between him of the one part and the said J. S. and G. S. his son and heir apparent of the other part, did bargain, sell, grant, enfeoff, release and confirm unto the said J. S. the said *Mead*, to have and to hold unto the said J. S. and G. S. their heirs and assigns to the only use and behoof of the said J. S. and G. S. their heirs and assigns. Livery was made of the premises to the uses above mentioned; J. S. dieth, G. S. his son and heir being within age; the question was whether G. S. should be in ward to the king or not. It was resolved,

1. That G. not being named in the premises cannot take by the *habendum*, and the livery doth not give any thing to him; yet the limitation of the use to J. and G. is good.

2. If the estate had been conveyed by the release and confirmation, the use limited would be good; for upon a release which creates an estate, a use may be limited or a rent reserved; but upon a release or confirmation which enure by way of *mitter le droit*, a use cannot be limited or a rent reserved.

3. The father and son were joint tenants, and the estate vested in the feoffee by the common law, is devested by

the statute, and executed according to the limitation of the uses. It was resolved that joint tenants might be seised to a use although they come in at several times, as if a man make a feoffment to the use of himself and such woman as he shall marry, when he marries, his wife shall take jointly with him, and in the mean time he takes all the use. And it was resolved that because the son took by survivor he should not be in ward.

Collins and Harding's Case, 39 Eliz. B. R. fo. 57.

A MAN seised of lands in fee, and also of lands by copy of court roll in fee, made one entire demise of all the said lands to H. for years, rendering one entire rent, and afterwards surrendered the copyhold lands to the use of C. and his heirs, and at another time by deed granted the reversion of the freehold lands to C. in fee, and H. attorned. And afterwards C. brought an action of debt for the whole rent in arrear.

It was resolved that the reservation of the rent was not an entire contract, but, by the act of the lessor and assent of the lessee, might be divided; for the rent is incident to the reversion, and as the reversion is severable, so is the rent. It was also adjudged that although C. cometh to the reversion by several conveyances, and at several times, he might bring an action of debt for the whole rent. *West and Lassel's Case, 43 Eliz.* a man devised the reversion of two parts, the devisee may have debt for two parts of the rent. *Ewen and Moyle's Case, 42 Eliz.* C. B. the devisee of the reversion of part shall avow for part of the rent.

De Modo Decimandi, fo. 58.

NOTE, it was adjudged 19 *Eliz.* in B. R. that where one obtained a prohibition upon prescription *de modo decimandi* by payment of a certain sum of money at a certain day; upon which the jury found the *modus* by payment of the said sum, but that it had been paid at another day, no consultation should be granted.

Ejectment de duabus partibus, 7 Jac. fo. 58.

- IN *ejectione firmæ* the writ and declaration were of two parts of certain lands, and doth not say of two parts in three parts to be divided, and yet it was good. It appears that by intendment of law, when any parts are demanded, without showing in how many parts the whole is divided, that there remains but one part. But when demand is made of other parts in other form, the same ought to be shown specially, as three parts of five parts, &c.

Mutton's Case, 7 Jac. C. B. fo. 59.

NO action lies for calling the plaintiff "sorcerer and enchanter."

Sir Allen Percy's Case, 7 Jac. in the Court of Wards, fo. 60.

J. F. and B. his wife, tenants for life, remainder to J. F. in tail, remainder to B. in tail, the reversion to J. F. and his heirs. J. F. & B. demised to *William Sprey*, for divers years yet to come, except all trees of timber, oak and ash, and liberty to carry them away; afterwards J. F. died, having issue a daughter, the wife of *Sir A. Percy*, and afterwards W. S. demised the said tenement to *Sir A.* for 7 years: the question was, whether *Sir A.* having the immediate inheritance in the right of his wife, expectant upon the estate for life of B., and also having possession by the said demise, might cut down the timber trees. It was resolved by the two chief justices, and the chief baron, that the exception was good, because he who hath the inheritance joins in the lease with the lessee for life. And tenant for life may lease for years, excepting the timber trees; otherwise if the lessee cuts down the timber, tenant for life should be punished in waste, and have no remedy against the lessee for years: and if he demise the land without exception, he who hath the immediate estate of inheritance, by the assent of the lessee, may cut down all

the timber, and when the term is ended, tenant for life would lose the profits of the trees which he lawfully might take; but when he excepts the trees, if they are cut down by the lessor, the lessee shall have an action of trespass. And this case is not like that of *Saunders*, 5 Rep. 12. which was affirmed to be good law.

Hulme's Case, 7 Jac. in the Court of Wards, fo. 61.

BY office 35 H. 8. it was found that lands were holden of the king as of his Duchy of *Lancaster*, by knight's service, whereas in truth they were holden of *E. Hulme*. Afterwards, 4 Jac. by another office, it was found that the same were holden of the king as before, whereupon R. H., heir of the said E. H., preferred a bill to be admitted to traverse the office found, 4 Jac. It was resolved that the finding of an office is no estoppel, and the party grieved may traverse the last office; but the first office is not traversable.

Parliament, 7 Jac. fo. 63.

NOTE, the privilege, order or custom of parliament, belongs to the determination only of parliament.

Heyward and Sir John Whitbroke's Case, 7 Jac. in the Star-Chamber, fo. 64.

IT was resolved by the justices and barons, that no process can be made by the star-chamber to levy damages upon the goods and lands of the defendant, but they can only keep him in prison until he pay them.

Morse and Webb's Case, 7 Jac. C. B. fo. 65.

IN replevin for taking two oxen, in a place called *Downfield*; the defendant, as bailiff, made conusance for damage-feasant; the plaintiff in bar prescribed for common in *Downfield*; the defendant traversed the prescription, and the jury found a special verdict, that the father

Smith and Hill's Case, 8 Jac. fo. 71.

IN a writ of error in the exchequer-chamber, the error assigned was in the *venire facias*, which was certified by writ of *certiorari*; and no return was made upon the back of the writ, (which is called *returnum album*,) and for that cause the judgment was reversed.

Wescot's Case, 7 Jac. in the Court of Wards, fo. 72.

IN a writ of *diem clausit extremum*, the jury found that the moiety of a manor was holden of the Prince of Wales, as of his castle of Trematon, by knight's service, as it appeareth by a certain exemplification of Trematon, for the same prince made, &c. It was resolved by the two chief justices and the chief baron, that the office concerning the tenure was insufficient and void, because the verdict of a jury ought to be full and direct, and not with a *prout patet*; and upon that a *melius inquirendum* shall issue.

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